OCTOBER 1905

MEDICO-LEGAL BULLETIN.

Vol. 4 No. 1

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PHILADELPHIA **NEW YORK**

Medico-Legal Bulletin.

THE INVISIBLE RAILWAY INJURY.

Of all sources of accidental injuries, our great lines of transportation furnish us the greatest number. The United States government report for the last quarter of 1904, recently published, gives some idea as to the mortality, as well as to non-fatal accidents: Fifty-three passengers and 189 employes were killed, 1430 passengers and 1868 employes injured; a total of 242 persons killed and 3298 injured in train wrecks. Other accidents to passengers and employes not the result of collisions or derailments, bring the total number of casualties up to 14,978—961 being killed. This report shows a decrease since the last preceding quarter. The financial damage to railroad property aggregated $2,406,281.

The number injured in one quarter of a year shows how it is possible to have so many complications in the way of adjustments, since the laws of our state, as well as others, amply provide for the injured party when the corporation is at fault. Not all of the so-called injuries were in reality injuries, but so reported. (I do not suppose that any of the reported dead were interred alive). Hence my subject, "The Invisible Railway Injury." That those who suffer by the negligence of others should be remunerated therefor, is pre-eminently correct in the social arrangement of our community, but every altruistic principle often paves the way for some colossal wrong. It is true in this instance. We occasionally see cases in which there is great doubt as to merit, this same cause being strenously urged hy some limb of the law, and too often aided by some member of our noble profession. When we think of the manner in which some lawyers have sold their legal talent to plunderers, how they have put their learning at the service of those whom they knew to be bent in perpetration of wrong, it is hard for any honest man to stand in their presence and hold back the flaming words of indignation.

The subject that worries every railroad physician, as well as every other conscientious doctor, is the invisible injury, the injury alleged not seen. Who is it that has not labored with the man with this phantom day after day, week after week, yea, month after month, to find that his medical ability fails to offer any relief until a compromise

or a favorable verdict completes a cure that is astonishing as well as disgusting. Such cases require the rarest ability in diagnosis in order to arrive at a just conclusion. The nucleus of the real trouble is often removed entirely from the subject, and found in the brain of the attorney, with some reflex trouble in the gray matter of some poor, unsophisticated (?) doctor.

There live in my part of this great commonwealth legal lights who are more familiar with the sympathetic nervous system than they are with their law books. No wonder, then, we are so frequently confronted with such difficult problems in diagnosis. If we knew more of the nervous system than we do today, it would relieve us of many embarrassing situations, since most of our injuries that are invisible are of a nervous origin. When our patient claims a certain neurotic trouble, the burden is on us, and it is not always light.

Traumatic neurosis, which we understand to mean a morbid condition following shock after an accident or injury, which some are pleased to call the "railway brain," and "railway spine," is indeed a sad condition, and such cases often have their merit, and should claim our best efforts for their relief. Care must be taken in every instance to recognize simulaiton, and as in these cases the condition is largely subjective, this is sometimes extremely difficult. By making a careful study of an individual case, we often find an exaggeration of many symptoms, especially the volunteer reflexes and sensitiveness along the spine. Thus the simulator often reveals himself when least expecting to do so. The great question to decide in these cases is: Have we or have we not some organic disease?

There was a time when the average layman did not know whether he was blessed with a spinal cord or merely had his several vertebræ strung on a cotton string for convenience. It is different now, since every court in Texas is a school for teaching anatomy, physiology, and especially pathology, to the various juries. I fear the instruction does not always carry all the elements of truth. It is amazing with what apparent deep learning Attorney Smith details the symptoms of acute central myelitis and acute transverse myelitis; how segments of the cord may be completely and permanently destroyed, how the pyramidal fibers below the lesion undergo secondary degeneartion, all due primarily to the concussion from stepping off a train in slight motion, or perchance an injury to some one of the spinous precesses.

In conclusion let me say, that the prevailing idea in the minds of some, that to secure damages from a corporation is no moral wrong, however unjust the proceedings may be, is sowing seed that is as false as hell itself, and will give us ultimately a degenerated citizenship. A man who would wantonly plunder a corporation, would rob his next door neighbor if he but dared. The same principle obtains in both instances. Let us all here assembled strive to get at the merit of the

man with the "invisible injury." May the scales of ingorance drop from our eyes so that the malingerer may find no quarter; not for the special purpose that some corporation may be saved a few paltry dollars, but for a more noble purpose—the wholesome moral influence on coming generations.—Texas State Medical Journal.

THE DUTY OF THE MEDICAL EXPERT TO THE INDIVIDUAL AND TO THE STATE.

By R. B. H. Gradwohl, M D., St. Louis, Mo.

Instructor of Pathological Anatomy in the Medical Department of St. Louis University; Physician to the Coroner of St. Louis.

The main flaw in our present system of medical expert testimony is its extremely partizan character. There are other flaws in the system. Some of these flaws and abuses were developed in a remarkable degree in a case in which I was recently retained as an expert. I propose to recite the medical facts of this case and such other points connected with it as are necessary to appreciate fully the argument. I refer to what has been called the "Watson case," recently tried in New London, Missouri, before the Circuit Court of Ralls County. The facts follow:

Dr. Taylor J. Watson, a married man, aged 40 years, a native of Ralls County, settled in Pueblo, Colorado, several years ago, and engaged in the practice of osteopathy. From all accounts he lived on terms of perfect happiness with his wife. Last July he came back to New London, accompanied by his wife, to visit relatives, intending later to visit the University Exposition at St. Louis. One afternoon, while driving with his wife in his brother's buggy, Watson journeyed down the Organ Ferry road to the iron bridge which crossed Salt River, about one mile from New London. The bridge is 35 feet high and rests upon piers set in the river near either bank. There is a wooden rail on the bridge, about 4 feet in height near the approaches to the bridge, increasing in height toward the center. The evening in question was July 5, 1904; it was raining. About 8 P. M. the horse and buggy, with no occupants, was found near the south end of the bridge (Watson drove on the bridge from the northern approach). The dashboard and shafts of the buggy were broken. Investigation revealed the unconscious form of Watson on the bridge. Help was summoned; Dr. W. T. Watson made a thorough examination and made a diagnosis of concussion of the brain; the patient was taken to town; search was made and the body of Mrs. Watson was later found in the river, under the bridge, floating on the surface of the water. She was prepared for burial; no visible marks of violence on the body were made out. She was embalmed and buried. Her husband recovered consciousness in thirty hours. He explained the accident by stating that

the horse became frightened at a piece of paper lying on the bridge and began lunging; memory of all events thereafter was completely lost. His version was accepted and nothing more was thought of the case, except the unfortunate manner in which Mrs. Watson lost her life.

When the accident insurance companies who had insured the life of Mrs. Watson to the extent of $18,000 in favor of her husband, were apprised of the case, they began an investigation to satisfy themselves that this was truly an accident. Apparently they thought there were suspicious circumstances connected with the case. They conducted a system of espionage on the movements of Watson, who subsequently came to the Exposition at St. Loius. Fortified by the results of their "shadowing" of Watson, emboldened by the convictions of their adjuster-detective representatives that foul play had been committed; working the science of deduction "overtime," to use a slang expression, the insurance companies employed two medical men of St. Louis to perform an autopsy on the body of Mrs. Watson. The body was exhumed and the autopsy was performed in the Court House at New London by the St. Louis physicians, in the presence of a number of local physicians. Their findings, as reported at the Coroner's inquest were, briefly, that they saw no signs of violence on the body, except a small abrasion over the nose; they found the pupils equal and contracted to the size of the "head of a pin." The brain and its membranes were normal. They testified that they opened the larynx, trachea, bronchi and lungs and found no foreign material present, no water, no sand. They testified that the lungs were "full and crepitant." They found clotted blood in the heart; liver, kidney and spleen were normal; the stomach was half filled with fluid They stated that there were no signs of violence or of drowning, or of disease, and, consequently, thought the subject had been poisoned. The particular poison used, in their opinion, was morphine. For chemical proof they tied off the stomach, cut off pieces of the liver and kidneys, took the heart and brain in toto, dumped all the viscera into an ordinary tin bucket and poured over them some alcohol purchased from the village drug store. A piece of paper was used as a cover for the bucket. They testified that the bucket and its contents were safely taken to St. Louis, locked up in a labroatory and afterwards delivered to a physician in East St. Louis for chemical analysis. He was directed to look for morphine. This physician stated at the coroner's inquest that he obtained three distinct color reactions of morphine. The verdict of the coroner's jury was to the effect that Watson killed his wife with morphine and after she was dead put her body in the river. Watson was held on an information issued by the Prosecuting Attorney of Ralls County for murder in the first degree.

Watson, now defendant charged with murder, employed Messrs.

J. O. Allison, R. F. Roy, C. T. Hays and G. W. Whitecotton as counsel. These gentlemen mapped out his defense along clean-cut, intelligent and honest lines. Their straightforward and manly methods in the conduct of the case stood out prominently against the pettyfogging and "grand-stand play" on the part of the State's attorneys and confreres. Struck by the demeanor of the State's experts while testifying before the coroner's inquest, knowing the facts of their partisan employment by the insurance companies, and not by the coroner of Ralls County, satisfied from the comments of other physicians who had been present at the autopsy that it had been incompletely performed, appalled by the fact that the viscera for a most exacting and delicate series of chemical manipulations had been ruthlessly and ignorantly deposited in a common, unclean tin bucket for transportaiton to the laboratory, subject to contaminations of all kinds while in this repository; feeling sure that their client was innocent, that his wife had been accidently drowned and not poisoned, these able men drew up their case.

A second autopsy was performed in a most painstaking and careful manner, observing everything, omitting nothing, concealing nothing, belittling nothing, magnifying nothing and manufacturing nothing. Most remarkable facts were adduced at this second autopsy. The lungs were found it full and crepitant," as described at the State's experts. The testimony of the State's experts that they freely incised the lungs, trachea, bronchi and larynx, seeking signs of drowning, met startling refutation at the second autopsy which disclosed the fact that the only incision made into the entire respiratory tract was a small incision which had cut off a piece of pulmonary tissue about three or four inches long from the lower part of the right lung, also the margins. The lungs had not been separated from their attachments; the bronchi had not been opened; the trachea had not been exposed; the larynx was untouched; in short, the second autopsy showed that the gentlemen testifying for the State had not spoken truthfully in regard to their autopsy findings. The evidences, the plain, honest evidences of sand and other foreign material, nay, even of water, in the trachea, bronchi and lungs, could not have been sought for, by virtue of this inadequate examination on the part of the first autopsy physicians.

I later examined the debris found in the respiratory tract, in larynx, trachea and bronchi, and found sand and plant cells in abundance. The second autopsy showed that the esophagus had not been opened at the first autopsy. It also contained sand and plant cells. The second autopsy showed that one kidney was intact and that a very small piece of the other had been cut off; a very small piece of the liver was missing. Further examination was made to determine the cause of death. The middle ear cavity on one side showed eight drops

of clear fluid present. This fluid was neutral in reaction, contained no albumin and no cellular constituents, and was, consequently, not an inflammatory product.

These several findings convinced the physicians at the second autopsy that ample signs of drowning were present. Nevertheless, a chemical examination was deemed expedient. Accordingly, the viscera, liver, kidney, small intestine and lungs were placed in separate clean glass jars, sealed, and taken in the custody of the sheriff of Ralls County to the laboratory of Dr. Victor C. Vaughan, of Ann Arbor, Michigan, where they were delivered to him in person. A sample of the embalming fluid was taken for chemical analysis. No analysis of the embalming fluid had been made by the State's chemist. In due time Dr. Vaughan reported that no signs of morphine were present in these viscera.

The testimony of the State's experts at the trial was very similar to what they said at the Coroner's inquest, excepting that cross-examination brought out some very "interesting" statements. The physician who made the first autopsy on the part of the insurance companies, gave his opinion that the cause of death was morphine poisoning; this was based on the minutely contracted pupils, and the "absence of any other signs pointing to any other cause of death." He denied the presence of any signs of drowning, he denied that "full and crepitant lungs" indicate drowning, although this is a diametrically opposed to authoritative teaching. He claimed that blood clots in the heart indicated morphine poisoning. While admitting that water in the middle ear is a good sign of drowning, he acknowledged that he had not looked for it, because, he said, "what is the use of it when the temperature is so hot you can almost faint, that you go in and saw out the ear, when you have all the other signs but that?" Later on, in rebutting the defense testimony that water was found in the middle ear at the second autopsy, he maintained a most novel and strictly preposterous proposition, i. e., that there is normally 60 drops of clear lymph in the middle ear cavity, and this is what was found at the second autopsy. This same State's expert maintained that in every case of drowning, water in determinable quantity is to be found in the lungs. Confronted with Ogston's statistics that water in the lungs is found in but 48 per cent. of observed cases (and Ogston has handled thousands), thas expert stated that "if he tells you he has handled thousands of cases, he must have been so busy it made him mentally off, and he would not be competent to write about it." This needs no comment. In genreal, he testified under cross-examination, that he considered medical literature of small moment compared to the results of his own experience.

The testimony of the physician who made the chemical analysis for the State can be dismissed with a few words. He stated that he

had obtained "three color reactions for morphine at a preliminary test" of the stomach contents. Later, "complete" examinations gave none of these reactions of morphine with the viscera. He presumed that the presence of the embalming fluid (which he discovered contained formaldehyd by its odor when extracting the tissues) probably prevented the appearance of the color reactions of morphine. Not a word in this direct examination as to whether he found the crystal of morphine; in his cross-examination he admitted that the finding of the crystals is an essential point to absolutely swear to morphine poisoning, yet acknowledged that he had not sought, and consequently had not found these essential crystals. His evidence indicated that he was not sure in his own mind at the time while testifying that he had found morphine, although he had been sure at the Coroner's inquest.

Dr. Victor C. Vaughan, of Ann Arbor, testified that he found no reactions for morphine in the tissues of Mrs. Watson. Testifying along expert lines, he stated that the color reactions are deceptive and unreliable; that many ptomains give color reaction resembling those of morphine; that in short, the color reactions of morphine when present do not necessarily mean that morphine is present; when absent, it means that morphine is not present. Dr. Vaughan stated that the only positive means of identifying morphine in these toxicological investigations was to find the crystals of morphine. Without finding the crystals we can not swear that morphine is present. Asked as to the presence of the formaldehyd embalming fluid, and its influence on the prevention of the appearance of the color reactions in animal tissue containing morphine, Dr. Vaughan stated that among experienced workers, there is no possibility of this interference, because it can be easily avoided by slowly evaporated off all the formaldehyd

The testimony of Dr. J. T. White, who performed the second autopsy, developed the signs of drowinng. My testimony corroborated Dr. White's.

Dr. W. T. Watson testified concerning Watson's condition. Dr. T. J. Downing testified likewise. They maintained that Watson had concussion of the brain. The state claimed he was shamming. There were additional experts on the question of concussions, Drs. Paul T. Tupper and C. G. Chaddock, who answered hypothetical questions in regard to Watson's condition. They believed that he had concussion.

The jury promptly returned a verdict of acquittal and Watson is now a free man, after having languished six months in a prison cell awaiting trial. The case was an illustration of how a private interest, in this case the insurance companies, can use the machinery of the criminal law, not only to prosecute, but even to persecute. In this case the dead woman's father was supposed to be the prosecuting wit-

ness, yet he was merely a blind, behind which stood the detective-agents of the insurance companies, pulling the wires which moved the State's attorney and the State's experts. The character of the State's expert testimony represented the acme of partisan testimony; they not only magnified the medical points favorable for the State and "forgot" the points favorable for the defense, but they actually hesitated not to drive home their statements with deliberate untruths. Medical expert testimony has suffered many a blow before the tribunal of justice, but I venture to say that no more disgraceful episode has ever occurred in court than the one I have here recounted.

This brings me to the question of the proper duty of the medical expert. We all realize that the partisan character of his employment militates against him. He unconsciously begins to feel that he must develop only those points favorable to his client. He becomes the medical advocate and loses his character as a witness. There was once a time when medical expert testimony in the courts of our country possessed almost judician weight. Alas, that time no longer exists. As Wharton in his work on "Evidence," truly says, "when expert testimony was first introduced, it was regarded with great respect. An expert was viewed as a representative of a science of which he was a professor, giving impartially its conclusions." Two conditions have combined to produce a material change in this relation. In the first place, it has been discovered that no expert, no matter how learned and incorruptible, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often the smaller the specialty, the bitterer and more inflaming and distorting are the animosities by which these factions are possessed—nihiltam absurdo—which being literally translated means that there is nothing so absurd that the philosophers won't say it. In the second place, the retaining of experts by a fee proportioned to the importance of their testimony is now as customary as is the retaining of lawyers. No court would take as testimony the sworn statement of the law given by counsel retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of his kind as to lose the power of impartial judgment; and so intense is this conviction that in every civilized community the retention by a judge of presents from suitors visits him not only with disqualification, but with disgrace. Hence it is, apart from the partisan part of their opinions, their utterances have lost all judicial authority, and are entitled only to the weight which sound and consistent criticism will award to the testimony itself. In making this criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact, but as to opinion, and who are selected, on all moot questions, either from their prior advocacy of them, or from their readiness to adopt the opinion to be proved. In this sense we may adopt the

strong language of Lord Kenyon, that "skilled experts come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." This opinion of expert testimony is held by most judicial authorities in this country.

We should ask in first order, why should this state of affairs have arisen, this disrepute of the medical wintess in court, and demand why should it be allowed to continue? Witthaus says that the main reason for the bad repute of the medical expert is the "employent of blatant, ignorant persons, or even persons who do not hesitate to commit plain perjury.'" Certainly the honest, competent medical man will give fair testimony to a certain extent, yet human nature is such that no matter how honest one's instincts are, there is often felt the intangible, indefinite, yet positive influence, of employent. One expert on a certain side knows nothing of the facts of his adversary and consequently can not scientifically sift out the good from the bad. This might be remedied by a conference of the experts before the case goes to trial. In some parts of England, experts refuse to testify unless there has been such a conference.

Another reason for the present disrepute of expert testimony is the fact that very often men are allowed to qualify in court as experts along certain special lines in which they do not really possess expert qualifications. They may be honest in their primary instincts, but they are ignorant. They are, perhaps, pitted against men who are really experts; in their zeal and ignorance they make misstatements and disagree with the other side. Their titles may appear much more high-sounding and elaborate than those of the opposite experts of merit. And it is a matter of common knowledge that "fools rush in where angels fear to tread," the ignorant and misguided expert can always be counted on to make absolute and sweeping statements, while his better-posted and more conservative adversary will qualify his answers; thus, it frequently happens that the real expert is apparently overshadowed by another expert who is mentally his inferior.

Responding again to the original proposition by offering a remedy why should this state of affairs have arisen, we might add that in general a high standard of medical education be required. The incompetent men, products of the diploma mills, are in abundance. They exist because the irregular schools each year are feeling the noose tightening more securely around their necks. When asphyxiation of these pests will finally have been accomplished, then will we have a natural death of their offspring—the incompetent physician and the incompetent witness. And I wish to emphasize here the point THAT LEGAL MEDICINE is not taught in our average American medical schools. With but few exceptions the course is limited to a few lectures by some

prominent member of the bar on "Medical jurisprudence." Legal medicine is not medical jurisprudence. Legal medicine is a specialty of medicine. In some schools legal medicine is taught by each specialist devoting a few hours to medical facts coming within his particular field, i. e., the obstetrican teaches autopsies, etc. Yet, as Prof. Draper, of Harvard, says in his admirable "Text-Book on Legal Medicine," "such a scheme, while plausible, is impracticable. In the nature of the case, it is unfruitful. An instructor gives instructions first and with the most zeal in matters which specially interest him. He does not readily turn aside to discuss topics which, however important they may be, are more or less remote from his immediate themes. Morover, it is evident that there are some things, the knowledge of which is essential to a full comprehension of medical jurisprudence, but which are outside any of the ordinary departments of instruction, and should, therefore, have independent treatment. Such topics, for example, as medical evidence in court and the legal relations of physicians to their patients and the community deserve special treatment." Another class believe that if one is well trained in medicine, if he knows his anatomy, his chemistry, his surgery and midwifery, if he is honest and tells the truth, he need not fear to meet any crisis in court.

Forensic medicine, it is declared, is not an independent part of medical science, but a pretender without valid right to recognition. It is asserted that it offers nothing new in medical knowledge of every educated and properly-equipped practitioner. That this is an unreasonable position, it requires but a moment's reflection to show. The knowledge is the same in general and forensic medicine, but in the latter it has novel relations and applications out of the common course.

"Medical questions," says a high authority, "assume a very different aspect and reflect very novel hues when viewed in the glare of the court of justice from what they do in the midlight of the sickroom or the hospital ward." Germany has the best corps of medical experts in the world. I can quote from the Verzeichniss of the University of Berlin, in the winter semester of 1900- 1901, when I was studying there, showing twelve different courses on legal medicine. Austria and France vie with Germany in the teaching of legal medicine. And we should have it taught in our schools without delay.

I have pointed out the flaws in our system. What is the remedy? The answer is difficult, yet the query can be answered. Mr. Henry Wollman, of the Kansas City bar, in a paper read before the Medico-Legal Society of New York (Medico-Legal Journal, March, 1900) suggests the appointment of a committee of experts by the representative medical society of each district, this committee to serve, say, for six months of a year. When expert testimony is required in such a district, let the attorneys go to this committee for their experts. [2] Let no member of the society consent to appear in court as an expert witness

unless his fellow practitioners have appointed him a member of that committee. This plan appears practicable. Another plan is the appointment by the court or by the Governor of each State of a commission of experts. Let these experts be nominated by their representative societes. Let them decide matters of expert testimony. Let their fees be paid by the court and the costs afterward assessed against the side which loses the suit. Let the whole proposition of partisan employment of exyerts be abolished. It is that partisan spirit which militates against the giving of impartial testimony. It seems contrary to the spirit of the Anglo-Saxon law to hope for a system of expert testimony in vogue now in France, Austria and Germany, where the expert is selected by the government on account of special training and qualification.

He examines into the medical features of a given case and subnits his findings which are absolutely judicial and admit of no argument. The Cruppi law in France regulated the appointment of experts for the defense in criminal causes. These experts, of course, are well qualified. The French law introduced by Brouardel in 1884 and adopted in 1900, demands a special course of nine months at the Paris University to become a medico-legal expert.

The legal physician of Germany must go through a special course and pass the special "Physikats-Examen" before he is qualified to be appointed. Could we have in this country a special diploma in legal medicine as proposed by Wyatt Johnstone, of Montreal, we could soon have a special class of men who would be eligible for positions like medical examiners or coroners' physicians. There is a demand for such men. The fact of them possessing a special diploma in legal medicine would well qualify them as experts. They would soon be recognized in court, and their statements be quasi-judicial, even though other testimony could be introduced; in short, while not possessing officially the absolute dictum-like character of the German or French government experts, they would practically decide the technical medical aspect of a murder charge, relieving the jury of that most arduous, unpleasant and, oftimes impossible task of obtaining an appreciation of the medical points of a case, and yet withal, Article VI of the Amendments to the Constitution of the United States would be held sacred, which demands that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with witnesses in his favor, and to have the assistance of counsel for his defense."—St. Louis Courier of Medicine.

Medico-Legal Bulletin.

PUBLISHED MONTHLY BY THE
PHYSICIANS DEFENSE COMPANY
Fort Wayne, Indiana

VOL. 4 OCTOBER 1905 NO. 1

THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

$1.00 Per Annum SUBSCRIPTION RATES **Single Copies 15c**

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CORPORATION CANNOT PRACTICE MEDICINE.

The Supreme Court of Nebraska in the case of Electro-Medico Institute vs. State, 103 N. W. Rep. 1079, holds that a corporation issuing a contract to a certain person agreeing that it will treat said party and administer medicines until they are cured, is not controvening the provisions of the following statute:

"It shall be unlawful for any person to practice medicine, surgery or obstetrics or any of the branches thereof, in this state, without first having applied for and obtained from the State Board of Health a license so to do."

The court holds that the practice of medicine is personal to the person so practicing and that a corporation cannot so conduct itself as to practice medicnen. Whatever the purpose of the corporation may be the court appears to hold that it can only exercise its powers through its agents and they, and not the corporation, are in reality practitioners of medicine.

LAW NOT RETROACTIVE.

The attorney-general has rendered an opinion in answer to a request regarding the osteopathic practice law, whether or not those who were practicing when the law went into effect would be required to take an examination. The attorney-general gives as his opinion that those who were in practice prior to March 17, 1903, need not be examined.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

COMPULSORY PHYSICAL EXAMINATION.

The Supreme Court of Montana says, in May vs. Northern Pacific Railway Co., that on the question of whether, in an action for personal injuries, a court may compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court, the authorities are in hopeless conflict, and any attempt to reconcile them would be barren of results. The first reported case in which the power of the court to compel such examination is asserted is Walsh vs. Sayre, 52 How. Prac. 334, decided by the New York Superior Court in 1868. This was an action for damages for malpractice, and on the analogy to cases of mayhem, divorce on the ground of impotency, and cases of controversies between a widow claiming to be pregnant by the decedent, and other heirs of the estate, wherein such examinations had been ordered, it was held that a court of law could compel the plaintiff to submit to a physical examination. A leading case on the subject is Schroeder vs. Railway Co., 47 Iowa, 375, decided in 1877. Mention is not made of the New Kork case cited above. The opinion states that there were no precedents at the time of its rendition. The power of the trial court to compel the plaintiff to submit to such an exaimnation is asserted.

After continuing the review showing the decisions of courts on the first presentation of this question to them, the Supreme Court of Montana says that the case of Walsh vs. Sayre was followed in Shaw vs. Van Rensselaer, 60 How. Prac., 143; but in 1901 the question came before the Court of Appeals of New York in McQuigan vs. Railway Co., 129 N. Y., 50, and Walsh vs. Sayre and Shaw vs. Van Rensselaer were overruled. The McQuigan case was followed in Cole vs. Fall Brook Coal Co., 159 N. Y., 59, decided in 1899. The Legislature of New York, however, circumvented the effect of these last decisions by enacting a statute directly conferring upon trial courts the power to make and enforce such an order. Then follows a further review of decisions, and the statement that if the last announcements of these several courts may be taken to indicate the law in their respective

states, a review of the decisions discloses that the power of trial courts to compel such examinations is asserted in Alabama, Arkansas, Georgia, Iowa, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Washington and Wisconsin, and denied in the federal courts, and in Illinois, Massachusetts and Texas, and was denied in New York until specifically granted by direct legislative enactment.

The bare assertion that trial courts possess this power, in the absence of any legislation, and without common law precedents, has led to the greatest possible confusion among the decisions of the very courts asserting it. (1) What is the source of the power? (2) To what extent may it be carried? (3) May the defendant demand the order as a matter of right? And (4) how will the court enforce obedience to its order?

1. Singularly enough, the first of these questions appears to have received little or no consideration. In some of the opinions it is said that the power is one inherent in the trial courts. In Graves vs. Battle Creek, 95 Mich., 266, decided in 1893, it is said, "It is true that the rule is one of modern growth." Most of the courts content themselves with the bare assertion of the power, without any discussion of its origin.

2. If the plaintiff may be compelled to submit to a physical examination, is the authority to order it an absolute or only a qualified one? May the plaintiff be compelled to submit to the administration to him of anesthetics or drugs by which he loses consciousness altogether or, if the injury is an internal one, may he be compelled to submit to the use of such surgical instruments as the physicians appointed to make the examination may see fit to use? May he be compelled to exhibit the injury to the jury in open court, and, if the plaintiff be a woman, is there any protection whatever against violence to her feelings? By some of these courts it has been held that anesthetics and drugs should not be used (Schroeder vs. Railway Co., Strudgeon vs. Sand Beach, 107 Mich., 496), and that the plaintiff should not be compelled to submit to the use of surgical instruments (O'Brien vs. La Crosse, 99 Wis., 421); but in Railway Co. vs. Palmore, 68 Kan., 545, it was held that the plaintiff could be compelled to submit to the examination, and to an injection of a drug into his injured eye to dilate the pupil; and in Hall vs. Manson, 99 Iowa, 698, it was held that the plaintiff, a woman, could be compelled to remove her shoe and stocking, that an examination might be had and measurements taken of her injured ankle in the presence of the jury. In Railway Co. vs. Hill, 8 South., 90, the Supreme Court of Alabama said: "When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice on the other, the law can not hesitate. Justice must be done." This is quoted with

approval in Lane vs. Railway Co., 21 Wash., 119. However, in Graves vs. Battle Creek, it is said: "The decisions are not uniform on this question, but the great weight of authority is in favor of the exercise of such power by the court under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination * * * where the sense of delicacy of the plaintiff may be offended by the exhibition." To the same effect is the decision in Ottawa vs. Gilliland, 63 Kan., 165.

3. In Sibley vs. Smith, 46 Ark., 275, and in Railroad Co. vs. Thul, 29 Kan., 466, it is held that the defendant may demand the order as a matter of right, but that in granting it the court may exercise its discretion. This court (the Supreme Court of Montana) is unable to understand this contradiction of terms, and observes that in most of the cases it is held that the application is one addressed to the sound discretion of the trial court, subject to review for manifest abuse only.

4. In the Schroeder Case and in Sibley vs. Smith it is said that refusal of the plaintiff to comply with the order would constitute contempt of court, and subject the plaintiff to the punishment of a recusant witness; while in Turnpike Co. vs. Baily, 37 Ohio St., 104; Lane vs. Railway Co., Wanek vs. Winona, 78 Minn., 98; Brown vs. Railroad Co., 12 N. D., 61, and in the dissenting opinion in Railroad Co. vs. Botsford, 141 U. S., 250, it is said that it is not a question of contempt; that the court can not compel the plaintiff to comply with the order which it has made, but, if he refuses, the court may dismiss his action or refuse to permit him to testify.

From the assertion of the power arising from the apparent necessities of extraordinary cases, as disclosed by the decision in the Schroeder Case, we observed the almost limitless extent to which the power has been carried; and, not content with applying the rule to civil actions for personal injuries, it has been extended to apply to the prosecuting witness in a criminal case (King vs. State, 100 Ala., 85), and, for the same reasons advanced for the exercise of the power in civil action by the courts asserting its existence, the doctrine has been applied to a criminal case, and the defendant compelled to bare to the view of the jury part of the unexposed portions of his body on which were certain tattoo marks, in order to enable the state to complete the case against him, with the result that the defendant was convicted of a capital offense. State vs. Ah Chuey, 14 Nev., 79.

The only instances in which such power was invoked at Common Law were in actions for divorce upon the ground of impotency, appeals of mayhem, cases of atrocious battery, cases of conviction of a woman of a capital crime who is alleged to be pregnant, and controversies between heirs and a widow claiming to be pregnant by the deceased. No one of these rules has ever obtained in this country, unless it has

been in cases of divorce on the ground of impotency. The power was exercised by the English ecclesiastical courts, and was a graft from the Civil Law.

The reasons advanced by the courts for the exercise of this power, in the absence of any direct authority, the Supreme Court of Montana goes on to say, do not commend themselves to it It says that it is said by some that the power is analogous to the proceeding for discovery; but discovery was not compelled by the law courts at Common Law. By other courts it is said that the assertion of this power is necessary to prevent the plaintiff from maligning and bolstering up a fictitious case "by the very unreliable speculations of so-called medical experts." Wanek vs. Winona, above cited. It is a curious process of reasoning which enables a court to characterize the solemn testimony of medical men as unreliable speculations when the witnesses are called by the plaintiff, but if these same physicians be called by the court, on application of the defendant, they immediately become the instrumentalities through which, not approximate, but exact, justice is to be done. Others, including the dissenting opinion in the Botsford Case, say it is strange that the plaintiff may, if he chooses, exhibit his injury to the jury, or may testify concerning it, or may have other witnesses do so, but he can not be compelled to make such exhibition. This court is of the opinion that even if the plaintiff might, as a matter of right, exhibit his injuries to the jury, it would not add to the argument in behalf of that view of the case. In this state (Montana), however, he does not possess that right. He may offer to do so, but it is within the discretion of the court to permit or refuse the offer, subject, of course, to review for a manifest abuse of that discretion.

The right to the inviolability of one's person is merely a privilege which the plaintiff may waive, as a defendant may the constitutional guaranty that in a criminal case he can not be compelled to be a witness against himself. As a defendant may give evidence against himself, but can not be compelled to do so unless he waives the privilege, so the plaintiff may exhibit portions of the clothed parts of his body to the jury, if the court permits, but can not be compelled to do so. The constitutional guarantee is not more solemn and binding in one instance than in the other. And, for the much stronger reason, the plaintiff can not be compelled to make such exhibition of himself to third parties, strangers to the case, in order that they may procure material for testimony.—J. A. M. A.

ADMISSIBILITY OF EVIDENCE FROM OPERATION AFTER TRIAL.

The Supreme Court of Kansas says that the case of Bousman vs. City of Stafford was brought to recover damages for injuries received in a fall caused by a defective sidewalk. The jury found against the plaintiff, perhaps as the result of a belief that his injuries were purely

imaginary. As alleged by him, they were internal, and of such a character that their existence and oriign could not at the time of the trial only be shown by his own statements and by the opinions of medical experts. The trial was ended Mar. 27. On June 26, but at the May term of court, the plaintiff filed a motion for a new trial on the ground of newly discovered evidence the character of which was not stated in the motion. In support of this motion, which was heard at the next term of court, in October, there was introduced an affidavit of a surgeon stating that on August 12 he operated on the plainitff, opening the abdomen, and found that, as the result of an injury, an intestine had been ruptured and an abscess had formed, from which various complications had ensued. The pertinence and importance of this evidence were not disputed, but the city contended that it was not sufficient to require the granting of a new trial, because it was merely cumulative. The court, however, does not think so. It says that the physicians could only give their opinions as experts on a matter necessarily involved in some doubt. The surgeon told of a plain physical fact, about which there could be no mistake. His evidence was not of the same character as theirs, and was not merely cumulative to any of it. In other words, the court holds that the testimony of a surgeon that, in the progress of an operation involving the opening of the abnomen of a patient he found an intestine ruptured, is not merely cumulative to that of a physician that on an external examination he concluded that such a rupture probably existed. Nor does the court agree with the objection made to the granting of the motion for a new trial that the court had no right to consider the affidavit of the surgeon, for the reason that it related to a fact that was not known to the plaintiff and cuold not have been known to any one at the time the motion for a new trial was filed. It holds that, on the hearing of a motion for a new trial on the ground of newly discovered evidence, the inquiry is not limited to matters known to the applicant or within his contemplation when the motion was filed, but may include, as well, any that have been developed since that time. Wherefore, it ordered a new trial.

ENTITLED TO REBUTTAL PHYSICAL EXAMINATION.

The Court of Civil Appeals of Texas says, in St. Louis Southwestern Railway Co. of Texas vs. Smith, a personal injury case brough by the latter party, that it is inclined to the opinion that if the plaintiff exhibited his eye to the jury, and his physician then and there undertook, while testifying, to point out the injury to the eye, the defendant company was entitled in rebuttal thereof to call medical experts of its own selection to in like manner examine the eye, and to give in testimony their opinion as a result of such examination.—J. A. M. A.

FRIENDLY EXAMINATION NOT A CONSULTING OF PHYSICIAN.

The United States Circuit Court of Appeals, Ninth Circuit, says, in Mutual Reserve Life Insurance Company of New York vs. Dobler, that an applicant for life insurance was asked when he had last consulted or been attended by a physician. His answer was: "Do not remember; years ago." The only evidence was that a physician who was his friend, made, at intervals, physical examinations of him to ascertain the condition of his health, and that this was done, not at the instance of the insured, but on the physician's own initiative, without charge, and for the sole purpose of rendering a friendly service. The court holds that it would be a misuse of words as they are ordinarily understood, and especially as they were employed in the application for insurance, to say that, in so submitting himself to those examinations, the insured consulted a physician or was attended by him.

THE TESTIMONY OF COMPANY SURGEONS IN RAILWAY DAMAGE SUITS—ITS EFFECT UPON THE JURY.

By M. Smith, M. D., Sulphur Springs, Texas.

In this paper I am going to deal with facts as I see them. In doing this I may be painfully plain, but it is the truth we want and not fiction. Hence, I am going to take this position: The testimony of the company doctor in a majority of personal-injury and cold-storage suits is not only discarded as bought-over, corporation goods, but is absolutely harmful to the case. I say this, first, because the juries of this or any other country are not competent to grasp or understand, in the least degree, the testimony of the doctor—fraught with many unnecessary technicalities—that, perhaps, the witness himself could not explain. As a case in point, the Missouri, Kansas and Texas Railway was sued for damages caused by a cold car, causing the patient to develop, in four or five hours after getting aboard the car, a severe infection of the thumb of his right hand, so he testified, which we, as medical men, know is decidedly improbable. This class of infection never occurs under twenty-four, and rarely ever before seventy-two hours. The thumb continued to pain him, and his entire arm was badly swollen for several days, causing high fever, etc. He recovered from this in due time. On his return home, he developed a catarrhal form of la grippe, with, his physician said, endocarditis and all the other "itises" that is possible for man to have. The suit was called in the district court. I, with the other company surgeon, was called to examine him. We found a slightly dilated stomach, a neurasthenic subject, and absolutely nothing pathological about his heart. Still his lawyers proved by other doctors that he did have an organic heart lesion, resulting from la grippe. A verdict for $2,500 war rendered in favor of the plaintiff. The attorneys are all good fellows, and will die by

you, but sometimes they go into extremes to gain a point. They were trying to make the jury believe, by the witness, that the blood poison caused the heart lesion, and not la grippe. They went back into the man's boyhood days and found a dog had bitten him, causing severe fright, and a bad sore, that might have been responsible for his so-called heart lesion The jury went to sleep. I told them before I examined the man that he could have valvular lesions from la grippe, but if he had endocarditis from a septic hand, he would have had septic endocarditis, and death would probably have resulted.

Case No. 2. Passenger on the Cotton Belt Railroad had occasion to go to the toilet while in transit. He claims he was standing up buttoning his clothes, when the car, a double-glassed-windowed one, swung to the right on a curve, soon swinging back to left. He did not make the swing, lost his balance, and thrust his head through one glass of the car window. He was immediately waited on by the porter and conductor. His destination being Sulphur Springs, he was sent to my office for treatment. I found his right eye had a number of small pieces of glass floating around on the conjunctival surface. I cocained it thoroughly, washed his eyes with warm, sterile boric acid solution, everted the lid, and ran cotton on an applicator over the entire field a number of times. I knew it meant a damage suit. I was exceedingly courteous to him, but after a few days he disappeared from my office. Under instructions from his attorney, he had employed another doctor, which closed my relation with the case until court, when the plaintiff put their doctor on the stand. He swore the fellow had traumatic glaucoma, was totally blind, and was about to lose the other eye I testified that the eye was absolutely and perfectly sound, not a trace of glaucoma in either, and all deep structures absolutely normal, as revealed by examination with two different ophthalmoscopes. I was corroborated by two physicians, both appointed by the court, one of them being an eye specialist. The jury returned a verdict in favor of plaintiff for $1,100.

Why is this? Are we in fault or not? I answer we are. When some of us go on the stand we are going into a fight for what we consider justice and right between man and man. We are expecting to be quizzed by both sides, and I believe we show from our actions we are too much biased on our side. The jury soon catches on. The opposite will do the same, but we represent the railroad, they the poor people. I am conscious of the fact that railway companies expect us to testify in their behalf, still they only want us to testify to just what exists unqualifiedly. I would not work for any company that would exact anything but honest, fair dealing in our business relations. In personal injury cases, I am careful to send in my report just as I know it is, and then I am fortified behind an entrenchment that no enemy

can overturn. The chief surgeon then knows what I will swear. The company knows where to place me, and know what estimate to place upon my testimony before the trial begins.

I read a very able article in one of my New York journals last year from Clark Bell, of New York City, on expert testimony. Among many other good things, was this: "Swear just what you know. Do not try to make the court think you do when you do not. Better say I don't know than have some shrewd lawyer make you acknowledge you don't after you have sworn you did, before court and jury." This rule I follow.

We have a class of physicians who allow themselves to be gulled into suits by designing lawyers, and shame to say, they accept a percentage fee. It is not professional; it is not right. I am ashamed of any doctor that will allow himself to be tolled away from the established laws of equity and ethics, and eat slop from the troughs of ill-gotten gain. He should have respect for himself, love for his profession, and manhood enough to renset such insults. I am not advocating the idea he should not examine cases to testify against railway companies. It is his privilege to do this. He should demand a legitimate fee for his services and not a percent.

I have talked to some of our best attorneys and judges along this line, and asked their opinion as to the effect of the company surgeon's testimony in damage suits. They answer as I have intimated before, that in many instances it is damaging to the case. Not because the jury thinks he is swearing falsely, but because of the prejudice of the people that make up the average jury against railway companies. The prevalent idea among people is to stick the company on general principles. I think the time is coming soon when this prejudice will vanish and the company can get justice, and their surgeon, if he be a man that deserves it, will stand on equal footing with the other side, and his testimony will be weighed as it should. The company surgeon goes on the stand to tell the truth, and his open, frank way, is so startling to the jury they are afraid to believe him. I heard a juryman say after one of those long and tedious "cold-storage" suits, that he enjoyed listening to the scientific testimony of the doctors, but he saw no sense in it, as it was too scientific for the jury to understand.

What is the remedy for this? I believe if the attorney would ask plain, practical questions, and get plain, practical answers, avoid self-arrogance, technical terms and unnecessary theories, perhaps peculiar to ourselves, be open, frank, positive, clear and cool, we would gain a great deal more. TEXAS STATE MEDICAL JOURNAL.

PRIVILEGED COMMUNICATIONS.

Section 3163 of the Code of Civil Procedure of Montana, among other things, provides: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: * * * (4) A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action as to any information acquired in attenting the padient which was necessary to enable him to prescribe or act for the patient." Most of the states in the union, if not all, the Supreme Court of Montana says, in the personal injury case of May vs. Northern Pacific Railway Co., have similar statutory provisions.

In the case before the court the plaintiff on her direct examination merely described her injury, and told of her treatment by two physicians. On cross-examination she admitted that a third physician had also attended her as her physician, and had treated her for the injury complained of; but she did not assume to detail any conversation had with him, or to tell of the character or extent of the treatment which he gave her. The defendant insisted that this physician should have been permitted to testify as to the condition of the plaintiff at the time he attended her as her physician. But the court does not think so.

Of course, says the court, if the patient tells the physician as a witness to testify, he thereby expressly consents to the proceeding, or, if he sits by and fails to object, he tacitly consents that the physician may testify. Furthermore, it has been held that where the patient directly attacks the physician, as by an action for damages for malpractice, he abandones the protection given by the statute, for he thereby challenges the physician to disprove the patient's contention as to the character of his injury or of the physician's treatment. Lane vs. Boicourt, 128 Ind., 420. It has also been held that where two or more physicians are employed at the same time, with respect to information gained at the same consultation, calling one of the physicians as a witness by the patient constitutes a waiver of the statutory prohibition as to the other or others (Morris vs. Railway Co., 148 N. Y., 88), although this doctrine is disputed by respectable authority (Baxter vs. Cedar Rapids, 103 Iowa, 599). Likewise it has been held that, where the patient calls the physician as a witness at one trial, this constitutes a wiaver of the privileges as to that physician on a second trial of the same case. McKinney vs. Railroad Co., 104 N. Y. 352. But this doctrine has also been disputed in Burgess vs. Sims Drug Co., 114 Iowa, 275, and Grattan sv. Insurance Co., 92 N. Y., 274.

But so far as this court's investigation discloses, no court of last

resort has ever held that the mere fact that the patient testifies generally concerning his condition constitutes a waiver of the privilege granted by the statute. In Marx vs. Railroad Co., 10 N. Y. Supp. 159, the Supreme Court of New York held that, where the patient assumes to tell all that took place between himself and the physician, this constitutes a waiver of the privilege; and in Treanor vs. Railroad Co., 16 N. Y. Supp, 536, decided by the Common Pleas Court of New York City, it was also held that, where the patient testifies Rithout reservation as to his injuries and their effect on him, this likewise constitutes a waiver of the privilege. But these cases were later disapproved, and in effect directly overruled, by the Supreme Court of New York in Fox vs. Turnpike Co., 69 N. Y. Supp. 551, and Dunckle vs. McAllister, 74 N. Y. Supp. 902, and by the Court of Appeals of New York in Morris vs. Railway Co., above cited. In Highfill vs. Railroad Co., 93 Mo. App. 219, it is said that, where a patient goes on the stand and testifies as to what his physician found and said, he thereby waives the privilege under the statute. It may be safely said that the Missouri Appellate Court is now the only court asserting the doctrine announced by it, and even that case can hardly be a precedent in favor of the contention of the defendant here, for this plaintiff did not assume to tell what the third physician mentioned had done for her, or to detail any conversations with him, and her statement that he had been her physician was not a voluntary one, but was brought out on cross-examination.

It is not the inherent incompetency of the evidence that precludes it being given, but it is the fact that the evidence comes from a person who occupies a certain relation of confidence to the patient, by virtue of which the statute says he shall not disclose his information without the consent of the person from whom he gained it. So far as this court is aware, the authorities are uniform in holding against the contention of the defendant in this case. Williams vs. Johnson, 112 Ind. 273; Railroad Co. vs. Shepherd, 30 Ind. App. 193; Warsaw vs. Fisher, 24 Ind. App. 47; Green vs. Nebagamain, 113 Wis. 508; McConnell vs. City of Osage, 80 Iowa, 293; Baxter vs. Cedar Rapids, 103 Iowa, 599; Burgess vs. Sims Drug Co., 114 Iowa, 275; Butler vs. Railway Co., 30 Abb. N. C. 78, affirmed in 143 N. Y. 630; Mellor vs. Railway Co., 105 Mo. 455.—J. A. M. A.

IMMATERIAL CONSULTATIONS OF PHYSICIANS.

The First Appellate Division of the Supreme Court of New York says that the applicant for the life insurance sued for in the case of Valentini vs. Metropolitan Life Insurance Company stated that a certain physician was the one who last attended him, in 1898, for rheumatism, and that he had not been under the care of his physician within

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NOVEMBER 1905

MEDICO-LEGAL BULLETIN.

Vol. 4 No. 2

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THE MEDICO-LEGAL ASPECT AND CRIMINAL PROCEDURE IN THE POISON CASES OF THE XVI CENTURY.

Charles Greene Cumston, M. D., Boston, Mass.

Member of the Medical Historical Society of France; Corresponding Member of the New York Medical Legal Society, etc

In the long chain of history one is constantly meeting mysterious deaths seizing vigorous people in robust health. The subjects usually occupy some high position and who disappear just at the time when their presence becomes an obstacle to an heir or a competitor. One immediately has the feeling that all these deaths are merely instances of homicide, although there are no absolute proof in favor of this hypothesis. Blood was not shed, the sword leaves no trace, nobody saw the assassin accomplish his crime and nevertheless general opinion refuses to believe that all these victims died natural deaths. They designate certain people by the terrible and detested name of poisoner. In point of fact poison has played a great part in history and was a much too convenient arm to be left aside and it is always found in the hands of those who, devoured by ambition, had not the courage to end their desire by the price of an outright murder. The latter had the misfortune of leaving some trace behind, which sooner or later would denounce the culprit, while poison would only leave a doubt as to the true nature of death and, for this reason, in all times it was employed in order to avoid intrigue. Poison was the arm of the aristocracy and kings did not disdain it, so that an example starting from so high a source was naturally followed by the courtiers in the first place and the people afterwards.

The true home of poison was the Orient and the princes of Asia, tired of bloody spectacles, searched for new voluptuousness by witnessing the effects of poison given to their slaves and consequently the history of Asia represents a long chain of dramas from death by poisoning. From the Orient this method came to Greece, but without making such impression there, because the loyalty of this people made them repugnant to such crimes, and they reserved poison for those they wished to put to death legally. In imperial Rome things were not the same and the then reigning conditions represented an essentially favor-

able midst for the development of homicide by poisoning and such instances rapidly became numerous. During the MiddleAgesthis crime appeared to be rare in France. This, however, does not mean that poisons were not known, because their use has never been forgotten, but they were hardly employed anywhere but at the Court and by high personages. Among the people sorcerers were the only ones to resost to their use and the ointments that they prepared only occasionally resulted in accidental death.

Suddenly, without hardly any transition, the Renaissance came to light. The Italians invaded France, giving this country all the great advances that the former had made in the culture of arts and science, but, at the same time, they brought with them their deplorable moral. Sensual and artistic, the prince of the Italian Court searched for art even in the way of giving death. To the grossness of the sword, which struck too openly, they preferred poison, which slowly infiltrated the veins and killed the strongest in the midst of feasts and fetes, without the loss of a drop of blood. They taught to France the most refined means of ridding those who came in the way and they sowed all the advantages derived from mineral poisons and taught the secret of the fearful poisonous compositions.

Catherine de Medicis arrived at the Court of France followed by a band of devoted Italian courtiers, who would obey any order, no matter its nature, that she might give. She belonged to a family who had become sadly celebrated by the innumerable forfeits that it accomlished and especially by its murders from poison. At the Court she continued the traditions of her ancestors with the aid of the Florentine Rene, who furnished her all the necessary poisons for the accomplishment of her designs. All the high positions were occupied by Italians, who brought the customs of their country into use. Poison was immediately chosen as one of the most suitable arms, all the more so as it assured impunity to the culprit.

In point of fact physicians were at this time unable to recognize its traces in the cadaver and autopsies only gave very vague information, while experimental researches had not as yet given the medical profession its precious concourse. Medical men occasionally were able to establish the reality of a death by poison, but they hesitated to announce the fact, because the discovery of the criminal might bring the hatred of some high personage upon them, whose influence was necessary. It was among the aristocracy that the poisoning habit first developed and the Court adopted this means with eagerness so that the judgment that Tremoille handed down regarding it was evern so true as during the Renaissance, which represented a combination of greatness and baseness. "The Court is an ambitious humility, a lubric chastity, a furious moderation, a tiresome love, a corrupted justice, a hungry abundance, a miserable highness, a state without

security, a contempt of virtue, an exaltation of vice, a dying life and a living death; the highest are in greater danger than the lowly, because Fortune does not smile upon the security of the great."

From the Court poisoning reached Paris and the nobles imported this crime into the Provinces, but it is not probable that it penetrated into the country and it is more likely that the peasants, as at the present time, used their natural arms to settle their quarrels without having recourse to these complicated procedures.

What was the role played by the physician in cases of poisoning, what means he had in his possession to detect the trace of poison and what help could the medical art give to justice in the XVI century are all questions which are most interesting to solve, because it was at this time that forensic medicine was created. It was to the genius of Ambroise Pare and his students, Cardan and Porta, that this science was brought out from obscurity and the immense service that it has since rendered to justice is well known. It had not at that time all those means of investigation which it today possesses, but one is obliged to admit that it acquired a very rapid development and that from its very commencement it was attentively followed by the legal profession. Without attaining the proportions that it reached during the following century homicide by poison had become sufficiently frequent for justice to become disturbed and it formulated special laws and punishments. Jousse, in his "Traite de la Justice Criminelle en France," published at Paris in 1771, tells us that the judges understood by the word poison "all drugs or chemical preparations capable of giving rise to death," and by poisoners "those who employed such means for killing other people." Love philters and abortive drinks were not considered, properly speaking, as poison, but they entered under this head when they caused the death of people to whom they had been given.

This definition having been established, let us consider how the criminal procedure at this epoch was carried out. When a person in perfect health was suddenly stricken by illness, especially when this occurred after a repast, opinion was never wanting to attribute the death as the result of a crime. As traces of violence could never be detected these deaths were immediately placed in the long list of the poison dramas The news circulated from mouth to mouth and the criminal was not long in being indicated under breath In possession of these suspicions, justice immediately commenced an inquest and its first act was to designate the physician to examine the victim.

One of two cases were then presented; there had been only a simple attempt and the person to be examined was living and could himself give all the necessary knowledge to the physician, or, on the other hand, the victim had died and an autopsy alone could verify or destroy all suspicion of poisoning. In the former case the physician based his

opinion on the symptoms of poisoning which, accroding to Ambrose Pare, were the following: "We recognize that a man has been poisoned, no matter in what way, when he complains of a great weight throughout the body, which makes him displeasing to himself; When the stomach gives him some horrible tastes in the mouth, entirely different than that derived from ordinary meat, no matter how bad it may be; when the color of the face changes, being either livid or yellow, or any other strange tint and deformed; when he complains of nausea and the desire to vomit; when he is possessed of an uneasiness of the entire body and it seems that everything about him is turned upside down; when without appearance of great or marked heat or cold, the patient falls from heart weakness accompanied by a cold sweat." To these symptoms which were always observed, other particular signs were noted with each kind of poison, which sometimes allowed the diagnosis of the substance given to be made. Besides the physician found a precious auxiliary in the examination of the vomited matter, but, at his epoch, chemical research being unknown, this examination was merely an illusion. This can readily be seen, because it would be very difficult to recognize the nature of a poison by the color and odor of the stomach contents, but never the less physicians could establish the reality of death by poisoning by procedures that we have mentioned, which, at this time, were the only ones that could be utilized.

When the victims had died an autopsy was performed and if the body was livid, covered with spots, exhaling a very bad odor, with black nails which were hardly attached to the fingers, with foam at the mouth, there were already very strong presumptions in favor of death by poison.

If examination of the interior of the body revealed indication of corrosions in the eosophagus or stomach, black spots in the intestine and congealed blood around the heart or in the stomach, there was no longer any doubt so that the hypothesis was fully confirmed. If the poison was found in any of the organs it was sometimes experimented with on animals. All these means were extremely meagre with which to make a serious accusation on, but the physicians of the XVI century could not do more than what the progress of science had up to that time taught them. Toxicology was, at this epoch, absolutely unknown and it was only later, death by poison that it was finally built upon a solid basis.

When in possession of these facts the physician wrote a report which was handed over to the courts, and, as an example of one of these, I hereby translate one given by Ambroise Pare in his work: "M. de Castellan, physician in ordinary to the King, and myself, were sent to open the body of certain personage that one suspected of having been poisoned because, before having supped he had not complained of any pain. And soon after supper he complained of a severe pain in

the stomach, crying out that he was suffocating, and the entire body became yellow and swollen, he was unable to breathe and panted like a dog who had run a long distance; because the diaphragm (the principle instrument for the respiration) being uanble to have its natural movement redoubled its energy and thus increased the respiration and expiration; then he had vertigo, spasm and falling of the heart and consequently death. Now, in truth, in the morning we are shown a dead body, which was greatly swollen just like a sheep that had been blown up for the purpose of skinning. The said d'Ambroise made the first incision, while I withdrew behind, knowing that a cadaverous and stinking exhalation would come out, this which did occur. and which all those present could hardly endure; the intestine and generally all the internal parts were greatly blown out and filled with air; and thus we found a large quantity of blood which had escaped into the entrails and the cavity of the thorax and it was concluded that the said personage might have met his death by poisoning."

I will now give another medico-legal report, although it was written much later, because it shows a greater advantage than the preceding one, which in reality is only a simple recital of an autopsy, how these reports were made out I translated it from "Doctrine des rappors de chirurgie," by Nicholas de Blegny, published at Lyons in 1684.

Reported by us, master surgeons sworn, in the City and jurisdiction of Lyons, that this day, Sept. 18, 1682, in execution of the ordinance of the Lieutenant General, we went to rue des Landes, in a house which bears as ensign the image of Saint Margaret, in order to visit the dead body of Suzane Pernet, a sworn matron, having found all the external parts in their natural position, we then proceeded to the opening of her body in the presence of Master Claude du Pradel, doctor of medicine, appointed to the place by the Lieutenant General; and having commenced by the abdomen and afterwards opened the stomach he found it completely cauterized in its fundus, which contained a black, sandy liquid in quantity about as much as an eggful, which, having been placed by us in a metal vessel, stained it, as would be done by acid and corrosive liquids, and which having been given in a small quantity to a dog, acted on him severely, as we were able to recognize by his cries, and howling, all of which made us consider that the said Pernet had been poisoned by arsenic or sublimate, or other such corrosive poisons of the mineral gender; in which we were all the more confirmed by the excellent condition of all the other internal parts, as much in the abdomen as in the chest and head, which we had likewise opened and where we found no cause for death, all of which we certify as true in faith of which we have, with the said Master du Pradel, signed the present reports, in order that it may serve whom it may concern. At Lyons the day and year above mentioned."

From these examples of medico-legal reports it at once becomes

evident how little knowledge was gained by autopsies. The doubt still remained in suspense and this is quite enough to explain the real reasons for the great number of deaths by poisoning in the XVI and XVII centuries. The accused, in spite of most serious presumptions, always was hopeful of escape from death, because his guilt was always a matter of doubt and the charges accumulated against him rarely resulted in an absolute certitude of his guilt. For this reason it was not until toxicologic researches had been carried out that the development to this form of crime could be stopped, which at the present time is one of the least frequent causes of criminal homicide. Arsenic, which was then the king of poisons, has since been almost completely given up by criminals, because toxicology allows one to discover the most infinite traces in the cadaver of the victim.

The penalties applied to prisoners varied according to the country, but in general these criminals were condemned to death and the type of execution only varied according to the local customs. It is to be remarked in the first place that in most instances the crime was committed by women, which is easily explained because on account of the weakness of their sex they could not revenge themselves by the use of arms. The poison was a hidden arm, striking with certitude and which perfectly fulfilled the natural dissimulation of their sex. Consequently one continually finds in the law texts of the epoch a distinction between the penalty applied to women and that to which men were subjected. According to the Carolina Constitution, Article 130, he who attempted to take the life of another person by poison was condemned to death. If the criminal was a man he died on the wheel, like a vulgar assassin, while if it was a woman she was thrown into the water. It was also specified that criminals should be dragged to the place of execution and that before this took place they should be more or less subjected to hot irons according to their condition and the circumstances of the crime. The penalty of death was also inflicted on poisoners in France, while the type of execution varied according to the circumstances and also the the local customs. Sometimes they were convicted and sentenced to be burned. The closer the degree of relationship existing between the accused and the victim also came into consideration when making the sentence and a son who poisoned his father or his mother was punished as a parricide, and parents who poisoned their children or wives their husbands under the same class.

The law established distinctions between those who sold the poison and those who administered it and in the same sense it did not inflict the same sentence to those who had caused the death of their victim and those who had simply committed a mere attempt. All these laws are to be found exposed in Farinacius and we will here translate them as given by Jousse.

"It is, however, necessary to observe respecting those who prepare

or distribute poisons for the purpose of poisoning somebody, or who buy poison with the same intention, that they should not be punished by the sentence of death only when they reduce their design in act, by doing something which may tend to cause death; and in this respect to those who sell and distribute it, knowing the use that one will make, they should not be punished with the ordinary laws applicable to poison, only when the design of him who wished to poison has been placed in execution and followed by death, otherwise they should be by a lighter sentence (Menochius)."

"If he who has bought, composed or prepared poison, in order to poison somebody, has not put his design into execution, because he has been prevented, he should not be punished by the sentence of death but only by less sereve punishment according to the circumstances and the quality of the person."

For a still more evident reason, this should also be applicable when the case is one where repentance prevented the criminal from executing his design and in the second case the punishment should be still less than in the preceding case."

Such were the legal dispositions relating to poisoning followed by death and in cases of simple attempt at poisoning. Physicians, apothecaries, veterinarians and in general all people who, from their business, kept toxic substances, were allowed to sell them, but before giving them to a buyer, they were expected to inquire as to the honesty of their client and the use of which he intended to put them. If these precautions were not taken and death followed, he who sold the poison was brought to trial in nearly the same capacity as the one who had administered it, and in many cases he was condemned to undergo the same sentence. Justice also applied laws to those who had committed multiple murders by poisoning, and the following are, according to Faricanius, the penalties that were applied to them. "Relative to those who poison water of a well, or a fountain, in order to kill those who may drink at these places, they should be punished as homicides; and this should not suffer any difficulty in application, when somebody has drunk from this well, or from this fountain, and which has caused death. But, if this occurred accidentally, it appears that the accused should not be punished by death sentence, but only by some other arbitrary sentence."

As a conclusion to all that we have said relative to the laws applicable to criminal poisoners, I would quote the two following judgments rendered by the courts. By a judgment handed down July 15, 1585, and related by Imber in his "Institutions forenses," a young woman of Paris, named Marie Leuge, daughter of a merchant in the same city, was hung and burned for having poisoned her husband, this act resulted from a blow that he had given her. In another decision handed down by the criminal court of Orleans on September 12, 1602, a young woman

14 years of age was convicted of poisoning her husband, who had died, and she was condemned to be hung, her body and her ashes thrown to the winds. She had administered arsenic in milk to her husband after having been seduced by the cure of the place. The cure's servant having been convicted for preparing the arsenic was, on Saturday, September 26, of the same year, condemned to be hung by the decision of the court and was in the Place du Matroi d'Orleans on Monday, October 26, in the same year. Curate condemned for incest with this young woman his parishioner, was condemned to be burned alive and the decision was executed at once.

I can hardly terminate this paper without making a few remarks relative to the legislation governing love philters and abortive drinks, the following being the article of the Fanon law relative to this question. "Those who give an abortive drink, or a love philter, even although they may cause no harm, but simply from the fact that such actions are a bad example, the culprits shall be condemned to the mines when they belong to the lower classes, while in the case of nobles there will be confiscation of one-half of their worldly goods and they shall be exiled to an island; but, if from fault, the woman or man shall have perished they are to undergo the severest sentence.

This text is exceedingly obscure and lends itself to several interpretations. In the first place, what does it mean by man or woman? The first hypothesis that may be admitted is that the term man applies to an animated fœtus, wihch, from this fact, was morally considered as a living individual, and from this it becomes evident that the word woman was used to designate the mother of the said fœtus, or else the woman corresponds to the abortive drink and man to the love philter.

Far be it from my intention to even endeavor to in any way settle this question, but it would appear to me that the last hypothesis is probably the most plausible. Now, in point of fact, the article included two different things, namely, the love philter and the abortive drink. Relative to the latter there can be no doubt because it could only be destined for woman. As to the second it was used in the masculine sex as well as in the female, but the construction of the article very probably only considered those cases where it was administered to a male subject. There is to be found in stated succession those who administer an abortive drink or a love philter, and further on "if from this fact the woman or man shall have perished;" these terms appear to well establish a near relationship between the abortive drink and the female on he one hand and between the love philter and the man on the other. However this may be, I consider, with Jousse, that there is not, properly speaking any special legislation applicable to the particular crimes. Those who employed them sufficiently maladroitly to bring about death were considered guilty of homicide and were punished as such. The sentence was considerably increased when malice

aforethought was added to the administration of a love philter. In the great majority of cases, however, the courts were rarely called upon to try these cases, because philters rarely give rise to death. Drinks given to produce sleep, or cause sterile women to conceive were assimilated to philters.—THE MEDICAL FORTNIGHTLY.

EXAMINATION AND CONSULTATION IN PERSONAL INJURY CASES.

By C. E. CANTRELL, M. D., Greenville, Texas.

I would like very much to say something that would help our profession to conduct itself in the best manner to gain the respect and dignity that I know it deserves. This can never be obtained with the respectable members of the profession divided among themselves on any subject claiming their attention. If any member or members of the profession in a given community will not be governed by the principles thought best and supported by the ablest men in the profession, the contrast soon becomes so great that the public will notice it, and the offender lose his influence in the community.

Medical jurisprudence means the application of medical knowledge to the principles of Common Law. This branch of science has been recognized by both the legal and medical professions for a long time. It was established first for the purpose of making this application to the Criminal Law and is still used for that purpose when the circumstances require, but in the main it has been transferred to civil proceedings, especially damage suits for personal injury brought against corporations. In making this application there are present the court, jury, attorney for each side, and the witness, all of whom have a sworn duty to perform. I will not deal with the duty of any but the witness, mentioning the others in connection with this duty when it appears that injustice is done the witness.

In the first place the witness should divest himself of all interests in the case except to know the truth and apply it fairly. To do this he should examine the injured party if possible. In this examination he should be extremely fair to the patient, follow the most modern rules of examination, in the presence of the family physician or the physician who has the case in charge. Physicians with sufficient knowedge to make such an examination can not afford to do so without pay, which should be so arranged that whatever he should find or say would have nothing to do with when, how, or what he should be paid. In the history of Medical Jurisprudence applied to Criminal Law, I have never read of examination having been denied either the plaintiff or defendant. In the new order of things, where knowledge is to be applied to not only common but special laws, it is frequently the case that the defendant will be asked to pay for injury when the right to have the injured one examined has been denied. In the

absence of any law to require this, cases go on trial without examination. In view of the fact that this wonld put the physician in the case in position to be criticized by the attorney for the other side, it is a duty he owes to himself and the profession he represents to demand that other physicians be allowed to examine the case before agreeing to go on the stand. I have always followed this rule, and find it highlv satisfactory to myself, and have never met with censure on account of it.

During the examination of the patient we should get the history of the case. The circumstances surrounding the accident should be carefully studied, as a slight injury may do more damage when received at a time when the surroundings are horrifying, than a very severe injury when there is nothing to make such impressions.

Consultation should be carried out with the same precision as if in private practice. The physician in charge should have all of the courtesies shown him that belongs to the family physician in private practice. The one chosen by the other side should have extended him all of the rights of a consultant. As in private practice, the consulting physician should have the right to examine the injured party, and then as in private practice, they should earnestly try to find out what there is in the case, as though they were going to treat it, as they have before them quite as difficult a task, if not more difficult, than treatment—that of imparting the knowledge to a jury of laymen, whose duty it is to apply this knowledge to the law, as given them by the court.

If those to whom the task of examination should disagree, they should ask that a third doctor be chosen by the ocurt, and bring him into the case, just as in private practice, and the three together go over the case and see if they can not solve the difficulties and help to arrive at a proper understanding. If the three should disagree on any point, the jury, as the family does in private practice, after hearing the testimony, could pass on who they would have serve them in supplying the knowledge that they would apply to the law. It is frequently charged against the medical profession that they try to cover up each other's mistakes when they are called on to consult, and that they should protect each other under the principles of ethics. This is true only as far as it can be done without doing someone else wrong. The principles do not teach that we should agree further than we can honestly agree, and it provides that we shall make uor differences known when they can not be reconciled honestly and with justice to all concerned.

It is a fact that the physician who has been called to see one who has been injured some time ago, maybe several monhs, or a year or two, does not see the primary condition at all, but only sees the secondary symptoms and any deformity that has been left after the patient has recovered from the first stage of the injury. In this case

he should be very careful to get from the physician who has treated the case the full history of the case, as there are many things that may leave in their wake the same effects and symptoms. We should be fair enough to ourselves and the physician in charge to take the most reasonable view of the individual case and not let an attorney for either side embarrass us by trying to make it appear that the symptoms have come from any but the most reasonable causes. It is the sworn duty of the attorney to make the best showing possible for his side of the case. It is the sworn duty of an expert witness to furnish the truth in the light of his knowledge, to be applied to the law as given by the court.

If the medical profession is respected as it should be and the standing we would like to see maintained, we must respect ourselves, and especially we must not let others ridicule us for being led into ridiculous attitudes. A report of some of the ridiculous things that has come up in my own experience may not be amiss. At one time I was called by the plaintiff, and refused to go on the stand until the injured was submitted to examination by the surgeons for the defense. I fully expected a consultation in the regular way, all parties being my friends, and who could imagine my surprise when I learned that said surgeons had been instructed to not divulge anything they found, this by doctors and attorneys whom I know to be my friends. Not long ago I was called to examine a man who was supposed to have traumatic consumption. The attorney who called me, knowing my views about consultation, told me he did not think consultation necessary, but when he did not obtain my promise to not consult, he went along with me. I was surprised when I went into the examinination and consultation to find the attorney for the other side there for the same purpose, and the doctor noncommittal.

Doctors, like other men, have their differences, and are entitled to them, but they have no right to make each other appear ridiculous by not trying to agree. If, after patient effort to agree, they should fail, they will be able to give better reasons for their differences of opinion. They can at least keep down much criticism.

I have heard more comment and unfavorable criticism of our profession from this cause than from all other sources, in the last ten years. Are we going to prevent it? If so, let us force attorneys to respect us; they will not unless they are forced to do so.

A vast majority of our law-makers come from the classes that administer the law, and unless they respect us we will never be able to control legislation affecting the public health.—Texas State Journal of Medicine.

Medico-Legal Bulletin.

PUBLISHED MONTHLY BY THE
PHYSICIANS DEFENSE COMPANY
Fort Wayne, Indiana

VOL. 4 NOVEMBER 1905 No. 2

THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request

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TECHNICAL ASSAULT.

The case of Pratt vs. Davis, in Illinois, and Mohr vs Williams, in Minnesota, are the first cases of courts of last resort involving the question of operation without consent. There have been cases in the trial courts involving these points as well as some cases in appellate courts which indirectly dealt with the question; probably, however, as a matter of dictum.

The extremes to which each of the above mentioned cases have gone in imposing liability upon the medical profession for what is commonly known as technical assault, or operation without consent, is indeed a surprise to both the legal and medical profession. When this question was presented to courts on different occasions previous to the above decisions it has always been intimated that a surgeon had an autonomy based upon what he considered, in his best judgment, to be for the welfare of his patient. That is, if a surgeon had the permission to perform an operation upon the body of his patient, it was generally conceded that since he was judged by the standards of average skill and diligence and was bound to exercise his best judgment, he should be allowed to exercise that judgment and average skill and ability in doing what he thought to be the best for his patient's ultimate good. Any other theory than the above would presuppose that the physician or surgeon could make an absolute accurate diagnosis of his patients' ailments and that the patient would know exactly what was ailing him. This is not only ridiculous in the light of science, but

is absolutely impossible. No surgeon knows absolutely what condition he will find in the abdomen or the head of his patient until an incision is made. Save probably the quack, no medical practitioner would attempt to say that he could absolutely diagnose the ills of his patient.

It would appear that in the light of humanity, as well as consistency with the established rules of law, relative to a surgeons' liability to his patient and the case and skill he is bound to exercise, that he should be allowed to exercise an autonomy in determining what operation should be performed and what should not be performed, based on his exercise of average care, skill and ability. This is the standard of his responsibility and should be also the standard o fhis liability. There is no doubt but what a step has been taken by the courts in the wrong direction, and while we do not mean to criticise the courts, for the conclusions arrived at, in that both opinions are exceedingly well considered and conscientiously thought out, still the theory established by them will promote more groundless litigation and will result in more injustice to the most conscientious and deserving profession, than any one element of our system of jurisprudence.

MUST REPORT DISEASES OF EYES OF INFANTS.

Chapter 251 of the Acts of Massachusetts of 1905 amends Section 49 of Chapter 75 of the revised laws of that state requiring a householder to give notice of dangerous diseases by incorporating therein this provision: "Should one or both eyes of an infant become inflamed, swollen and red, and show an unnatural discharge at any time within two weeks after its birth, it shall be the duty of the nurse, relative or other attendant having charge of such infant to report in writing, within six hours thereafter, to the board of health of the city or town in which the parents of the infant reside, the fact that such inflammation, swelling and redness of the eyes and unnatural discharge exist. On receipt of such report, or of notice of the same symptoms given by a physician as provided by the following section, the board of health shall take such immediate action as it may deem necessary in order that blindness may be prevented." Whoever violates the provisions of this section shall be punished by a fine of not more than $100. Section 50, relative to physicians is made with new matter indicated by quotation marks to read· If a physician knows that a person whom he is called to ivsit is infected with smallpox, diphtheria, scarlet fever or any other diseases dangerous to the public health, "or if one or both eyes of an infant whom or whose mother he is called to visit, become inflamed, swollen and red, and show an unnatural discharge within two weeks after the birth of such infant," he shall immediately give notice thereof in writing over his own signature to the selectmen or board of health of the town; and if he refuses or neglects to give such notice, he shall forfeit not less than $50 nor more than $200 for each offence.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

PHYSICIAN COMPETENT TO GIVE CERTAIN OPINION EVIDENCE.

The Supreme Court of New Mexico says, in Miera vs. Territory, that opinion evidence is not, in its nature, so distinct from and inferior to what is usually termed direct evidence as it is, perhaps, commonly assumed to be. In the last analysis all testimony may fairly be termed opinion evidence, and the court may properly act on the familiar principle that the best evidence should be offered. Unquestionably, in many cases so-called opinion evidence would be more helpful than any direct testimony obtainable, and that for two reasons: First, it may be the testimony of one to whose sight, hearing or other senses has been presented that which can not be reproduced to the jury. It is said in opposition to the admission of such testimony that the facts should be stated to the jury, and the opinion formed by it. But not even the great masters of literature have been able to put in words precisely what they saw, still less what was apprehended by their other senses. In recognition of this truism courts have permitted witnesses to state their opinions with regard to sounds, their character, from what they proceed, and the direction from which they seem to come; as to resemblance of foot tracks; whether a person's conduct was insulting; and where noisome odors renders a dwelling uncomfortable, etc. Second. The opinion may be that of a person qualified by study or experience, or both, to understand and explain the subject under consideration, commonly termed an "expert." The opinion of such witnesses are taken in all courts on a great variety of subjects, but not usually on the question whether death was self-inflicted. In State vs. Lee. 65 Conn. 265 (1894), however, and in Commonwealth vs. Leach, 156 Mass. 99, the testimony of a physician was adimtted on that point; but in each of those instances the wound testified of was in the uterus, to procure abortion, and it might be said that if it had been an outward wound, open to common observation, the testimony would have been rejected. That objection, it seems to this court, goes to the weight, and not to the admissibility, of such testimony. Physicians have been allowed to testify that sexual intercourse was highly improbable, if not impossible, between a man and a woman in a buggy, which was

described to the jury (People vs. Clark, 33 Mich. 1122); that such intercourse by force was impossible with a woman seated in a rocking chiar, which was shown to the jury (State vs. Perry, 41 W. Va. 641); and that it was impossible in a winding stairway, which was described to the jury (McMurrin vs. Rigby, 80 Iowa, 322). Certainly it can not be claimed that wounds causing death are more a matter of common knowledge than the act to which the human race owes its continuance. In 41 W. Va. the admission of the testimony in question was put expressly, and in the other cases impliedly, on the ground that the witnesses "had made the human system, including its joints and organs, the subject of peculiar study, such as a jury would be unable to give in the short time allowed them in the examination of the evidence, and thus (could) assist them in arriving at a just conclusion." Precisely that kind of research would qualify one to determine better than an ordinary person could do whether a wound could have been self-inflicted. And this court holds that an experienced physician, who held an inquest on the body of the woman with whose murder the defendant was charged, was properly permitted to testify that, in his opinion, she could not have inflicted on herself the wound of which she died, and that she was sitting down when the shot was fired. To exclude such testimony, it says, is to hold that the opinion of a jury, based on evidence necessarily incomplete, is preferable to that of a man of learning and experience, who has seen and touched that of which he speaks. The value of the physician's opinion was for the jury to determine. If it preferred to form and adopt an opinion of its own on the other evidence given it was at liberty to do so.

A SUPREME COURT ON A LOW AGE OF CONSENT.

The Supreme Court of Mississippi takes occasion, as it says, in Dickey vs. State, to express its opinion concerning the wisdom and justice of the conclusive presumption of law (as apparently at present in that state) that a female child over the age of 10 years has sufficient intelligence and discretion to consent to the surrender of her virtue and the defilement of her person. Every child, under 14, the court declares, is presumed by tbe law to be incapax doli (that is, mentally incapable of entertaining a criminal intent), because presumed not to have developed sufficient intelligence and moral perception to distinguish between right and wrong and to comprehend the consequences of his act. And hence no child under 14 can be punished for any crime except on proof of exceptional intelligence and maturity. And yet, while this is true, and while it is further true that a female child less than 10 years old, by so much as a day, is conclusively presumed incapable of consenting to sexual commerce, a female child over 10, by so much as a day, is conclusively presumed capable of consenting to the sacrifice of her virginity, her social undoing and her moral ruin.

This, the court supposes, by analogy, is because she is presumed to have sufficient intelligence and moral discrimination to distinguish between right and wrong, and to comprehend the ruinous consequences of the act. This presumption is inconsistent with the presumption of incapacity to commit crime, and in irreconcilable conflict with the truth, and is an insult to our intelligence. We all know that the overwhelming majority of the girls of this state under 14 years of age, in their ignorance and innocence, do not and can not have any adequate understanding of sexual commerce, nor any comprehension of the ruinous consequences of a lapse from virtue. The legal presumption which declares that every female over 10 years of age is fully capable of giving intelligent assent to her own ruin, and which, therefore, make her fair play for any lecherous scoundrel who can impose on her innocence and credulity, is a reproach to the law, a disgrace to a Christian state, and a blot on the civilization of the age. The girls of the state under 14 should be protected by a legal presumption that they are incapable of consenting to their own shame This presumption might be made either prima facie or conclusive. If prima facie, it might be allowed to be rebutted on proof of exceptional intelligence and maturity. If conclusive, the penalty might, in the discretion of the trial court, be made either death, imprisonment for life, or imprisonment for a term. In this way, without injustice to any one, our daughters could be protected by the law until such time as they could reasonably be presumed to have sufficient discretion to protect themselves against the machinations of the seducer.

LAW AGAINST MARRIAGE OF THE DISEASED AND DEGENERATE.

Michigan is the first state to have the courage to enact such a law. The following is the text of the law:

Section 6. No insane person, idiot, or person who has been afflicted with syphilis or gonorrhea, and has not been cured of the same, shall be capable of contracting marriage. All marriages heretofore contracted between white persons and those wholly or in part of African descent, are hereby declared valid and effectual in law for all purposes; and the issues of such marriages shall be deemed and taken as legitimate as to such issue and as to both of the parents. Any person who has been afflicted of syphilis or gonorrhea and has not been cured of the same, who shall marry shall be deemed guilty of a felony and upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the state prison at Jackson not more than five years or by both such fine and imprisonment in the discretion of the court: Provided, That in all prosecutions under this act a husband shall be examined as a witness against his wife and a wife shall be examined as a witness against her husband, whether such

husband or wife consent or not: And provided further, That in all cases arising under this act any physician who has attended or prescribed for any husband or wife for either of the diseases above mentioned shall be compelled to testify to any facts found by him from such attendance. No person who has been confined in any public institution or asylum as an epileptic, feeble-minded, imbecile or insane patient shall be capable of contracting marriage without, before the issuance by the county clerk of the license to marry, filing in the office of said county clerk a verified certificate from two regularly licensed physician of this state that such person has been completely cured of such insanity, epilepsy, imbecility, or feeble-mindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage. Any person of sound mind who shall intermarry with such insane person or idiot or persons who has been so confined as an epileptic, feeble-minded, imbecile or insane patient in any public institution or asylum, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage, contrary to the provisions of this section shall be deemed guilty of a felony and on conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison at Jackson not less than one year or more than five years, or by both such fine and imprisonment in the discretion of the court.—THE MEDICAL WORLD, Sept., 1905.

INSANITY AND EXPERT EVIDENCE.

The Supreme Judicial Court of Massachusetts says, in the homicide case of Commonwealth vs Johnson, whete the only defense offered was the insanity of the defendant at the time of the homicide, that on this issue it was competent for him to show that his ancestors or relatives had been insane, but the order in which the evidence should be introduced was wholly within the discretion of the trial court. A refusal to permit the cross-examination of the government expert on the relative value and reputation of medical authorities who had written on the general subject of insanity, as well as the exclusion of certain hypothetical questions addressed to them, were also discretionary. Nor is error found in the government having been allowed to question each of these experts as to whether he had formed any opinion, from his examinations and investigations and what he had heard in court, as to the mental condition of the defendant on date named, the physical and mental history of his family and himself, on which the questions were founded, having come solely from the defendant's statements, letters, and admissions or from his witnesses, and having been accepted as true, while it further appeared that each of the experts also had seen

and examined him. Then, this question having been answered in the affirmative, and an opinion given that he was sane, followed by a similar reply to the further question, "What is your opinion of his sanity now?" the court says that if a question of this character resting on the assumption of the truth of the evidence of a plaintiff alone, is admissible, which has been held, there is in principle no substantial reason why a medical expert, who has not made an examination of the patient whose physical or mental condition he is called on to determine, but has heard it described by witnesses at the trial, should not answer similar questions without their being hypothetically framed. By this form of examination no injustice is done, for whatever reasons, even to the smallest details, that an expert may have for his opinion, can be fully brought out by cross-examination. But here, as in other matters relating to the general management of trials, much must be left to the judgment of the trial court, which will not be revised unless the course pursued plainly was prejudicial to the legal rights of the defendant. Thus the length of hypothetical questions, or whether the facts assumed are within the hypothesis on which it is claimed the case rests, or whether a witness is professionally qualified, or is sufficiently acquainted with the history of the case to give an opinion, are as well within the reasonable exercise of this power as the order of presentation of evidence, etc. It further must be held that, as each of these experts also testified from personal observation of the defendant, a direct question calling for their opinion formed on such an examination would have been competent. As the case stood, their opinions rested on the assumption of the truth of the uncontradicted testimony, so far as material, which each had heard, considered in the light of the knowledge of his intellectual condition previously obtained from actual contact. The number of witnesses does not alter the practical operation of the rule, if there was no conflict of evidence, or the facts so complicated that there may be danger of the jury being confused and misled. But if the evidence is of a complicated and contradictory character, and such that it would be likely to be understood differently by intelligent jurors, the question should call for the facts on which the opinion is founded. Evidence descriptive of the attitude and appearance of the defendant when under scrutiny by one of the experts was entirely competent, either as being in the nature of a conversation with him, or as furnishing a reason for the opinion of the witness. But an exception taken to the omission of any instruction that experts, when testifying as witnesses, must state the grounds or reasons for their opinions. was untenable. If the defendant desired their reasons, his counsel were not precluded from asking for them on cross-examination. There is no general rule of practice which makes it imperative on the party calling such a witness, that, after he has been duly qualified and given an opinion, his reasons therefor also must be stated, though it is frequently done.—J. A. M. A.

PRIVILEGE IN FEDERAL COURTS—HEALTH STIPULATIONS.

The United States Circuit Court of Appeals, Third Circuit, says that at the trial, in the United States Circuit Court for the District of New Jersey, in the case of Doll vs Equitable Life Assurance Society, objection was made to allowing a practicing physician and surgeon of New York, who had attended the sister of the insured in her last illness, to testify as to the cause of her death. The ground of this objection was that a statute of the state of New York prohibited a physician or surgeon from disclosing "any information which he might have acquired in attending any patient in a professional character and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as surgeon." Counsel contended that, inasmuch as the contract of insurance was made in the state of New York, the law and usages of the place of the contract should govern in matters of construction affecting the validity of the contract and the rights of the parties, and that, therefore, this statute was controlling in the trial of this case. But the Circuit Court of Appeals thinks that the judge of the Circuit Court committed no error in admitting the testimony objected to. It says that the contention stated confused those laws which enter into and form a part of the contract, or with reference to which the contract was made, with those, merely which govern remedy and procedure. The prohibition of the New York statute is a rule as to evidence or procedure, and does not enter into the contract of insurance. The interpretation of the contract does not at all depend on it. The rule affects the remedy and not the contract In such cases the law of the forum (of the place where legal redress is sought) and not of the place of the contract, must govern. The New York statute, therefore, was not applicable to the trial in the United States Circuit Court for the District of New Jersey. Section 721 of the United States Revised Statutes, providing for the application of state laws to trials in the United States courts, had no relevancy to the point here under consideration. The Supreme Court of the United States, in Connecticut Mutual Life Ins. Co. vs. Union Trust Company, 112 U. S. 250, merely decided that the provision of the New York statute here referred to was obligatory on the court of the United State sitting within that state. Another thing said by the Uinted States Circuit Court of Appeals in this case is that courts have been reasonable, and sought to protect the beneficiaries of life insurance policies from careless or ill-considered statements as to prior health, by not holding non-serious ailments or those not material to the risk, within the warranty of a statement by the insured, but it will not do, by too great refinement of argumentation, to fritter away the protection which these stipulations as to previous illness are properly intended to give to the insurer. They must receive a sensible and reasonable construction

DUTY AND LIABILITY UNDER CONTAGIOUS-DISEASE STATUTE.

The Appellate Court of Indiana, division No. 1, says, in town of Knightstown vs. Homer, that by Section 6718 of Burns' Annotated Statutes of Indiana of 1901 the trustees of each town in that state shall constitute ex-officio a board of health for such town, and it is made the duty of such board to "elect a secretary who shall be the health officer of the appointing board," and it is the duty of such board "to protect the public health by the removal of causes of disease when known, and in all cases to take prompt action to arrest the spread of contagious and infectious diseases." Smallpox is an infectious and contagious disease, and, under the statute, it is the duty of the town board to take immediate and active measures to prevent the spread of this disease among its people. The discovery of a contagious disease like smallpox in a thickly settled community, whether one or more cases, as it seems to the court, creates an immediate necessity for activity on the part of those chagred with the duty of preventing its spread, and creates a liability on the part of the town to pay any necessary expense incurred by its health board, or, in the absence of an order of its health board, the expense incurred by its "health officer," under such an emergency. This was an action against the town to recover, among other things, for damage to property destroyed to prevent smallpox contagion in the town. The property was shown to be of the value of $75 at the time a patient was taken to the plaintiff's home, and worthless at the time destroyed. Thus was present the question, Did the rule for fixing the amount of damages apply to the value of the property at the time it was discovered that the patient was afflicted with smallpox, or at the time the property was taken by the board of health and destroyed? The patient was in the plaintiff's home not by any act or command of the board of health or its secretary, but he was there at the direction of the plaintiff's husband, and with her consent, and there remained until his death, without request from the plaintiff to any one for his removal. Under these facts, as it seems to the court, the rule for assessing the plaintiff's damages for the property so taken, if the town was liable therefor, should be what the property was worth as there situate at the time it was destroyed. If the rule here announced for the assessment of damages be correct, and the property burned was worthless at the time it was so destroyed, as the plaintiff testified, then there could be no recovery for the item of property, as no damages were proven. Again, the court says that acts for the purpose of preventing the spread of disease are wholly within the jurisdiction of the board of health, and the town can only be made liable when the board acts within the scope of its authority, or for the acts of the secretary of the board when an emergency arises and he is acting within the scope of his authority Nor does the court think that the plaintiff ought to be allowed for nursing and caring for her child, who was taken with

varioloid shortly after the death of the smallpox patient above referred to. It says that there was nothing in the evidence which showed that she was in indigent circumstances, or was not clearly able financially to provide any and all means necessary for the care and attention of her son. She and her son were quarantined in her own home, and, in the absence of a statute making the town liable for such services so rendered by her to her son, the town was not liable.

ADMISSIBILITY OF DYING DECLARATIONS.

The Supreme Court of Illinois says, in Brom vs. People, that the admission of the dying declaration of the deceased in a homicide case forms an exception or qualification to the well-settled rule that secondary or hearsay evidence is not admissible. The reasons usually given in the books for the admission of such declarations are, first, that the solemnity of the occasion under which they are made dispenses with the necessity of an oath, and, secondly, the impossibility in many cases of producing better proof of the homicide makes it necessary that such declarations be admitted in order that those clearly guilty may not escape punishment. Such declarations are made not under oath. There is no opportunity given to cross-examine the party making the same, and the accused is deprived of the right to meet his accuser before the court and jury face to face, and the courts, for those reasons are not disposed to extend the rule to embrace cases which do not clearly fall within all its limitations. The cases in which said declarations are admitted have been confined by the courts to cases where the declraations were made by the injured party under the fixed belief and moral conviction that his death was impending and certain to follow almost immediately. The declaration in this case may have heen excited from what the physicians told him, and may have thought, from his condition, that he would not get well, and that he might eventually die from the effects of his wounds. That, however, was not sufficient to make the declaration admissible. He must have entertained at the time he signed the declaration a fixed belief and moral conviction that his death was then impending, and certain to follow almost immediately. The question of his belief that his death was impending and certain to follow almost immediately could not alone be determined from what the physician testified he said on that subject on the occasion of signing the instrument, but his acts were to be considered in connection with his words, as well as the circumstances which surrounded him at the time the declaration was signed, in determining what his belief relative to his immediate death was at that time. Furthermore, while the court does not hold that he could not have ratified a statement prepared the previous evening by the state's attorney, so as to have made it his dying declaration, the evidence that he did ratify it after it was impressed with impending death should be of such a character as to satisfy the mind of such ratification beyond any reasonable doubt.

PHYSICIANS AS EXPERT WITNESSES AND THEIR OPINIONS.

The Supreme Court of Alabama says, in Braham vs. State, a homicide case, tha a physician, as an expert, having testified in answer to a hypothetical question that under the hypothesis stated he would say the person was of unsound mind, it was proper on cross-examination for the state to test the accuracy of his information as to the causes of insanity. The jury is not concluded by the opinions given by experts on the question of whether sanity exists or not, and, while the court pronounces on the competency of witnesses as experts, it is the province of the jury to measure the weight of their opinions. In order that the jury may have a proper appreciation of the value of such opinions, it is entirely competent to develope on cross-examination the extent and accuracy of the expert's knowledge of the particular subject on which he has been called to testify as an expert. Another witness in this case testified on the direct examination that he was a practicing physician, and had been such since 1897; that he was assistant county physician and had seen the defendant a number of times in the county jail; that he treated the defendant for a severe cold, which turned out to be measles; and that he treated him again a few days before the trial. He further testified that he saw the defendant often in the jail, and talked with him, he supposed, a dozen times; that his conversations were chiefly about his physical condition; that from his acquaintance with, observation of, the defendant, and from his professional knowledge, he would say that the defendant was sane. On cross-examination the defendant asked the physician this question: "Are you an expert on insanity?" The court has been unable to find any case in which the precise question presented has been considered. It is undoubtedly the law that the court must determine the question of the competency of a witness to testify as an expert, and that all evidence which goes to the competency of such witness should be addressed to the court. It is also true that, after a witness has been held competent competent by the court, it is the province of the jury to determine the weight of the evidence of such witness, and, as ruled above, a jury is not concluded by the opinion of experts, but must weigh such opinions with the other evidence; and in order to afford the jury ample opportunity to test the value of such opinions it is competent on cross-examination to inquire of the expert as to the extent and accuracy of his knowledge with reference to the particular subject on which, as an expert, he has expressed an opinion. As was said in De Phue's case, 44 Ala. 39, "A physician is an expert, and as such he may be asked questions which develop his capacity to form a correct judgment on the experiences of his profession." In this respect it might be competent to ask the physician if he had a diploma, or from what college he graduated, or the extent of his experience in the treatment of persons afflicted with insanity. In this way some of the data would be

furnished on which the court, in the first instance, would be able to draw its conclusions as to the competency of the witness, and the jury, in connection with the evidence on which the opinion is based, could measure the weight to be accorded the opinion expressed. But this court submits that the question under consideration did not call for any data of the kind above referred to, nor data of any kind, but simply called for the opinion or conclusion of the witness as to his capability; and to have allowed an answer to it would have been to substitute the witness for the court and jury, whose duty it was to pass on the competency of the witness and the weight of his evidence. It was insisted by counsel that the question should have been allowed because it called for a fact peculiarly within the knowledge of the witness. But not every fact that lies peculiarly within the knowledge of a witness is competent evidence. The court notes, too, the fact that the witness, by his evidence, made himself competent to express an opinion that the defendant was of sound mind, aside from the fact that he was an expert.—J. A. M. A.

AGE OR WEIGHT AND PERSONAL INJURIES.

The Court of Errors and Appeals of New Jersey holds, in the personal injury case of Staines vs. Central Railroad Company of New Jersey, that the fact that the injuries of the plaintiff would not have happened to a younger person, or one of less weight, did not absolve the defendant from liability for such injuries.

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DECEMBER 1905

MEDICO-LEGAL BULLETIN.

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LIABILITY OF DRUGGIST.

In view of the discussion in the different magazines because of the decision of the Supreme Court of New York, Laturen vs. Bolton Drug Company, reported in the 93 N. Y. supplement 1035, a discussion of the fundamental principles of a druggist's liabilities may be of interest to the profession.

In most of the states of U. S., and England and Canada, there are statutes regulating the sale of drugs, and requiring that the sale of same be made under the supervision or the direction of a person licensed by the state to compound drugs. There is a distinction in England between druggists and pharmacists, this distinction, however, does not appear in America. The terms druggist, pharmacist and apothecary are interchangeable and to all practical intentions and purposes are synonymous. Ordinarily when a druggist sells drugs or medicines to a customer, he impliably warrants that they are of the character called for. Jones vs. George 56 Tex. 148.

In this case a certain planter engaged in raising cotton purchased from a druggist an article supposed to be paris green, for the known purpose of killing cotton worm. The druggist delivered to the purchaser another which was a harmless drug, instead of paris-green. It was held that there was an implied warranty that the druggist sold and delivered an article of the kind called for and purchased by the planter. In delivering its opinion the court said: "Appellee (druggist) was engaged in the business of a druggist, holding himself out to the public as one having a peculiar learning and skill necessary to the safe and proper conducting of the business. The general customer is not supposed to be skilled in these matters and, as represented in this case, does not know one drug from another; but in the purchase of drugs the customer himself relies upon the druggist to furnish the article called for; and in this particular business, the customer who has not the experience and learning necessary to the proper vending of drugs would not be held to the rule that they must examine for themselves. It would be idle mockery for the customer to make the examination when it would avail him nothing. On the contrary, the business is such that the druggist must be held to warrant that he will deliver the drug called for and purchased by the customer." The druggist is bound to

know the properties of the medicines he vends, and if through the negligence, or want of skill of himself or his servants, in compounding or selling medicines with injurious results he is liable in damages to the party injured.

Smith vs. Hays 23 Ill. App. 244. McCubbin vs. Hastings 27 La. Ann. 717.

In the case of Thomas vs. Winchester 6 N. Y 396, it was held that the dealer in drugs and medicines who carelessly labels deadly poisons as harmless medicine, and sends it so labeled into the market, is liable to any person who, without fault on his part, is injured thereby, without it may have passed through their hands, by intermediate sales before it reached the person injured. The facts of the case are as follows: The defendant, a druggist, negligently sold a package of poison labeled as extract of dandelion, a harmless medicine, to another druggist, who resold it to a third person, who sold it to the plaintiff. The plaintiff was injured by making use of it, supposing it to be carefully labeled. The court said in rendering its opinion, "In the present case the sale of the poison was made to a dealer in drugs, and not to a consumer; the injury, therefore, was not likely to fall on him or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as did exactly happen. The defendant's negligence put life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger or the exercise of due caution? Or that the exercise of that caution was a duty only to his immediate vendee, whose life was not in danger?

The defendant's liability rose out of the nature of his business and the danger to others incident to its mismanagement, nothing but mischief like that which exactly happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the consequence of the act. The duty of exercising caution in this respect did not rise out of the defendant's contract of sale; the wrong done by the defendant by putting the poison mislabeled into the hands of the dealer as an article of merchandise, to be sold and afterward used as an extract of dandelion by some person then unknown.

The druggist is not bound to fill the prescription, unless such refusal would impugne incapacity on the part of the physician writing the same and has no liability to such physician.

As seen from a case printed in this number of the Medico-Legal Bulletin, a druggist has no right to retain a prescription for his files, unless he delivers the medicine, compounded, to the person presenting the prescription.

The case of Howes vs. Rose 13 Ind. App. 674 holds that the label of a harmless drug, placed by reputable wholesale druggists on a poisonous drug purchased from them will not protect from liability the retail

druggist who fails to discover a mistake in handling the drug and putting it into a jar, and who negligently sells it as the harmless drug indicated by the label. In this case the retailers insist that they were protected by the label of the reputable wholesale dealers. If the drug sold had been received and labeled in an unbroken package and had by them been sold to the consumer, in an unbroken package, there would be no responsibility in this connection, but here the package was broken, the contents were handled and put into a jar by the retailer and was again dealt out in small quantities to the appellee and their agents had the opportunity of seeing, knowing and determining the character of the drug. It was further insisted that the liability, if any, is against the wholesale dealers or those who improperly labeled the drug. It is perhaps true that an action would lie against the person who made the first mistake, but it does not follow from this that the retailers are excused.

If they were guilty of negligence in making the sale, they must respond.

A distinction has been made between the case of the sale of a poisonous drug, and the sale of an article in itself harmless and which became harmful only by being used in combination with some other article without any knowledge by the druggist that it was to be used in such combination. In the latter case, the druggist does not, it is held, render himself liable to an action by one who purchased the article from the original vendee, and who is injured while using it in combination with another article, although by mistake the article sold is different from that which is intended to be sold.

In Davidson vs. Nichols 11 Allen (Mass.) 514, the court said, we know of no rule or principle of law by which the vendee or an article can be held liable for mistakes in the nature or quality of the article arising from the carelessness and negligence, which caused loss or injury to the other persons than immediate vendee, where there has been no false representation in the sale, and the article sold was in itself harmless and especially where the sale is made without any notice to the vendor that the article is bought for a third person, or that it is intended to be used in combination with other substances which may make it dangerous or injurious to persons or property.

MEDICAL RECIPROCITY.

The Medical Sentinel is frequently receiving letters from eastern doctors inquiring about the subject of medical reciprocity, and the extent to which it prevails on the Coast. Some of these correspondents desire to move to the Pacific Coast, and in some instances, doubtless, they would find it a hardship to undergo an examination at the hands of our various medical boards. At a recent meeting of the State Society of Idaho, the subject was very fully and ably discussed, and

the arguments pro and con were urged with considerable force. The remark of Dr. Conant to the effect that nearly every medical law allowed, at the time of its passage, everyone practicing medicine in the state, to be licensed, is certainly a cogent argument against reciprocity. The additional argument that the state would be flooded with eastern physicians if they had no examination to pass, is one that appeals very strongly to the doctors who are now practicing in the state. So it is not at all likely that any state on the Coast will for a long time to come favor any such general reciprocal legislation. The only thing they will favor will be a limited reciprocity, which will include a few states on the Pacific Coast, so that a man living on the border of one state, will be allowed to respond to calls in an adjoining state, and vice versa.

Some of our contemporaries urge the establishment of a Federal Board, before whom intending practitioners of medicine should appear, and when they get a certificate to practice, this certificate would entitle them to practice in any state of the Union. But that would not be exactly satisfactory to the western physician, who is not desirous of seeing his territory flooded with men who are following Greeley's advice to go west, nor would such a law be constitutional if it thereby robbed the various states of the right, now possessed, to say who shall and who shall not, be allowed to practice medicine within their borders. Theoretically the doctors all over the country are delighted to see more doctors, bent on relieving human suffering. But practically the Pacific Coast doctors, like those elsewhere, realize that it is altogether possible to overdo the thing, and have a supply that is far in excess of the demand. Probably the best thing is to let the matter stay where it is, with a regulation providing that the doctors in a small area may be allowed to step over state lines without being prosecuted for practicing without a license.—THE MEDICAL SENTINEL, Nov. 1905.

MALPRACTITIONER CONVICTED.

"Dr." J. H. King, of Philadelphia, was convicted last week of criminal malpractice and sentenced to three years in the Eastern Penitentiary.—AMERICAN MEDICINE, Nov. 11, 1905.

PRESCRIBING WHEN DRUNK.

Section 365 of Chapter 169 of the Laws of Indiana of 1905, an act concerning public offenses, provides that whoever, while in a state of intoxication, prescribes or administers any poison, drug or medicine to another, which endangers the life of such other person, shall, on conviction, be fined not less than $10 nor more than $100, and be imprisoned in the county jail not less than ten days nor more than three months.—J. A. M. A.

RIGHT TO BE PAID FOR ATTENDING INQUEST.

Section 515 of the Iowa code provides that the coroner "shall hold an inquest on the dead bodies of such persons only as are supposed to have died by unlawful means," etc. By virtue of Section 529, when he deems it requisite, "he may summon one or more physicians or surgeons to make a scientific examination, who shall receive a reasonable compensation to be allowed by the board of supervisors." In the case of Finarty vs. Marion County, which was brought by a physician to recover for services rendered in making such an examination on the summons of the coroner, the defense was made that the inquest was not lawful "for the reason that not the slightest suspicion or supposition existed that the deceased person had come to his death by unlawful means." But the Supreme Court of Iowa affirms a judgment in favor of the physician. It says that from the simple reading of the provisions quoted it seems clear enough that the supposition on which jurisdiction to act is made to rest must be one which arises—and, for that matter, exclusively so—in the mind of the coroner. He certainly could not justify him for acting in any given case if the facts presented to him were such as that his own mind rejected the supposition that death had been caused by unlawful means. However, the allegation of the county amounted to nothing more than an assertion that the county, from the information gathered from it, had reached the conclusion that there was no room to suppose or to suspect that death had resulted from unlawful means. The allegation, then, was of a conclusion; not only that, but it must be apparent that the subject-matter thereof was wholly immaterial. A second sufficient answer to the county's contention was that the coroner was acting within the forms of law and in the apparent exercise of his lawful jurisdiction. In such cases it is not for a witness, whether he be subpœnaed or summoned, to stand on the order of his going until a satisfactory showing is made to him that jurisdiction in the tribunal which demands his attendance is so far perfect as that he may be certain of his compensation in case he obeys. It is for him to answer, and, in cases where it is provided by statute, it is for the county, on proper demand, to pay. —J. A. M. A.

THE MEDICO-LEGAL ASPECT OF INSANITY.

By Dr. W. P. Whery, Fort Wayne, Ind.

This paper is not on insanity in general, but only on its medico-legal aspects. Modern science has modified older conceptions of insanity, and the courts have always been disposed to accommodate their rulings to the changes that advancing knowledge involves.

In ancient times an insane person was believed to be possessed by the devil, and insanity was classed as something supernatural. This

crude but terrible superstitition accounted for some of the severities with which the patients were treated. It has left a definite impression on the popular mind that is not yet irradicated, causing the insane to be regarded as entirely different from other sick persons, and causing the courts to treat their civil rights in an exceptional manner. However, since the obsersional theory has been abandoned there is reason to hope that other misconceptions surrounding this subject, may, in the light of medical science, be cleared away.

The term insanity, or unsoundness, implies disease, and might as well apply to the body as to the mind, but general usage has restricted it to the latter. There was, in former times, a mistaken notion that mind belonged to the soul instead of the body, and that mental disorders did not fall into the same category with corporal diseases. This is why the hospitals for the insane are designated Asylums, and if the only thing to be done for them was to place them in isolation—equivalent to their civil death and burial. But now we have no doubt that physical disease is somatic and that its treatment should be in an ordinary hospital.

Another misconception that has not quite disappeared is that a person if once insane is always insane. In other words, an attack of insanity is supposed to taint the patient for life, and this taint is even extended to his offspring and to his collateral relatives. As a matter of fact a wife or nurse or physician in frequent attendance on an insane patient is liable to become insane also. This is not because insanity is a communicable disease but because the attendant's mental condition was unstable and easily unbalanced by constant observation of the patient. In this way a doctor who frequently prescribes narcotics is liable to become a morphine fiend himself, or anyone who frequents the company of hard drinkers may turn out to be a drunkard. These effects are the natural consequences of a previously existing morbid mental inequilibrium in the subject affected.

What the law does to an insane person is, in these days, much more merciful than their treatment in the old Bedlams. But even yet they are subjected to a severity beyond that awarded to a patient afflicted with smallpox or leprosy.

They are in many instances judged to be of unsound mind by inexpert medical examiners, taken forcibly to an asylum or special hospiatl, there detained and disciplined like a criminal, deprived of most of their civil rights and, practically, of all their property, and eventually, if discharged "cured," are liable at any future time to have the fact of insanity brought up against them, either to prevent their freedom of action or as a defense if they are charged with crime.

The scientific idea of insanity is that it is a disease, due to disease of the cells of the brain. The mind is a function of the nervous system. Mental disorder is nervous disorder. And psychology is only a depart-

ment of general physiology. Like many other diseases insanity has an incubative period when the brain disease exists but has not yet manifested itself by symptoms; but some severe and continuous mental strain or some sudden great nervous shock may develop the latent disease into a pronounced case of insanity.

Following from these statements the treatment of insanity belongs to therapeutics in general. And the special purpose of this paper is to impress on all who may be engaged in medico-legal cases the importance of adopting a sane and scientific view of the question of insanity.

Insanity is a group of symptoms of cerebral disease characterized by perversion in some degree of the mental faculties Disease or defect of the brain may be congenital and conduce to insanity; but we do not recognize such a thing as congenital insanity. As nothing can be pronounced "dead" which has never been alive, so no one can be insane who has not previously been sane. Insanity is a change and a loss of the normal status. This is the conventional acceptation of the term insanity, and it is, of course, much narrower than the scientific definition.

The grey cells of the brain are probably the most remarkable particles of matter in the universe. They have several most important functions. For instance, a motor function, directing the movements of the voluntary muscles; a sensory function, presiding over general tactile sensation; functions of special sense, enabling us to smell, taste, hear and see; and the mental function, the chief of them all. The symptom complex that we designate "insanity" is the indication of disease of the grey cells of the brain. Such disease may be temporary and of brief duration. It may be intermittent like malaria. It may be irregularly recurrent like gout or rheumatism. It may manifest itself in different patients in a variety of ways like the many phases of dyspepsia. It may be incurable like the malignant disorders. And it may be completely cured in favorable cases.

All our actions—and these include the words we utter—are due to the energy of our nervous system. Everything that we do or say is caused by the operation of the nerves. Whether a deed be intentional or unintended it is always a consequence of nervous energy. There are three causes or impulses of our acts: sense impressions, that lead to reflex action; emotional or instinctive impulses; and intelligent or rational impulses. Reflex actions can seldom be controlled by the mind. Sneezing from irritation of the Schneiderian membrane, laughing when we are tickled, crying out when we are hurt or surprised, and such like are examples of actions with which the mind has but little to do. For the purpose of this discussion the mind may be said to consist of the intelligence or reason and the emotional or instincts of feelings or passions. Ribot, in his well-known work, refers to diseases of the consciousness or personality and diseases of the will. But we may

leave the will out of consideration here, because it is the servant of the intelligent or emotional impulses of the mind. Volition and consciousness are mental modes of action, while intelligence and emotion are essential elements or faculties of the mind. Very many of our actions are due to emotional or intelligent impulses and inclinations, and most of our actions are legally correct. But occasionally there is an emotional impulse to do some act that is forbidden by law or custom. Here, the reason may interfere and prevent the illegal action. The reason or intellect often controls, or exhibits, the impulse of the emotions. This is the ordinary course of sane minds. But the intellect itself may conceive and plan an illegal act, and it is sometimes prevented from accomplishing it by the resistance offered by the instinctive impulses. Thus, a guilty motive may be held back from translation into criminal action by such emotions as fear, pride, pity, or habitual propriety. This is the way in which intelligence and emotion form a perfect equilibrium in sane minds. Sanity, of course, is not synonymous with proper and legal conduct. The greatest criminals are sane. It is not true that criminals are always degenerates. But sanity always predicates perfect self-control and the discrimination of right from wrong. As insanity is often alleged as a defense against a criminal charge, we should consider whether it is a valid defense and why it should be so. It is an accepted axiom that only responsible agents can be guilty of crime and amenable to punishment. The plea of insanity therefor is equivalent to the claim of irresponsibility. This plea is based on the syllogism that every insane person is irresponsible, that John Doe is insane, and therefore he is irresponsible and immune. It is often sufficient to prove a malfactor insane to establish the conclusion that he should not be convicted or punished. But it is partly the object of my paper to combat such a conclusion as this.

The method taken to prove a man insane is often to show that he is eccentric in his speech or actions, that his self-control or his intelligence is defective, that he has delusions and tendencies to go wrong, that he is dangerous to himself or others, that he has become changed from his former or normal self, and that certain symptoms of morbid mentality have presented themselves in his case. It is not necessary that the patient should be "raving mad" with acute mania and delirium, or that he should become totally demented as in general paralysis. Many persons are insane in a slight degree. Many that are thought sane are subject to a latent insanity that may break forth unexpectedly. Many are hovering on the borderland of insanity but never cross it. No hard and fast line of demarkation can be drawn between sanity and insanity so as to fit all cases. We have read that "great wits o madness often are allied." Some of the most famous personages in history have been crazy or epileptics. Suicides are often very unjustly pronounced insane. And several distinct symptoms of brain disease,

such as ammesia, aphasia, and so forth, may co-exist with insanity, and yet by themselves do not prove that the patient presenting them is ipso facto insane. Finally, idiocy and imbecility are excluded from the definition of insanity. But, in practice, a single symptom of alienism is enough for the examiner who has a suspected patient's liberty in his hands Then the unwarranted inference is drawn that he is insane, and the unwarranted implication is added that once or at any time insane he is always insane and irresponsible.

Now from the earliest times it was noticed that insane persons are not always in the same mental conditions. That is, that insanity is generally paroxysmal. They were called "lunatics" because the insane paroxysm coincided, as was supposed, with lunation. Even acute mania has intervals of remission. In the popular phrase the insane have lucid intervals. Monomaniacs are not insane, it is believed, on all subjects. Then we hear of emotional insanity as a contrast to intellectual insanity, suggesting that reason is subject to passion. And all these distinctions of insanity lead to the conclusion that the patients may be only partially insane or only occasionally insane, and temporary insanity is a common term to express this view.

This is the popular, and perhaps the legal, conception of insanity. It is held that a person who has ever been adjudged insane may become temporarily insane at a specified moment, and that he may have lucid intervals of any length during which he is sane. If he commits a crime, especially a very atrocious one, it is to be taken as a recurrence of insanity, and he is therefore irresponsible. An inmate of an asylum remarked to the doctor, "If I kill you, I shall not be punished for it, for you know I am insane."

I want here to repeat that insanity is not separable from physical defect. It is a disease of the brain. It is a disease of the material part of the patient, and affect his mentality because the mind is a function of the brain. Insanity is to be diagnosed like all other diseases. Sometimes, like digestive ailments, diagnosed by the symptoms, and sometimes we can prove by an autopsy the exact nature and extent of the cerebral disorder. If the brain be inflamed or pressed on by a tumor, the mind is affected. Consciousness may be lost, perverted thinking or feeling may be induced, acute mania may be a resultant. In other words some degree of mental disorder or insanity may be due to the brain disease. Mental disorder then may be congenital or acquired. The brain may not be developed or may become accidentally diseased. In either case there is abnormal mentality. And like other diseases, brain diseases are often curable, and with the cure the insanity that results from them disappears.

Most insane people are quite capable of knowing right from wrong. Some people seem to have no moral sense, but this is generally a result of parental neglect. The development of a conscience is one of the

most important objects of a religious education. If the insane person once knew right from wrong he will know it after he has been adjudged insane. The insane are also capable of exercising self-control. The discipline of every asylum is based on this fact. By fear or favor the patients are kept in order, just as we manage young children. They sometimes plan crimes with great ingenuity and effect them with extraordinary cunning. The fact of malice aforethought in their case is incontestable. Though they often commit emotional crimes in a paroxysm of passion, yet they know very well what they are about. People in the same way may disorder their brains with drugs like alcohol, cannabis indica, morphine and various loco plants. They are in the same condition as regards self-control and knowledge of right and wrong as are the insane during a paroxysm.

There is often in our minds a confusion of thought between insanity and anarchy. Anarchy is a revolt against rule or law. Anarchy may be political, social, intellectual, or emotional. All social animals are governed by law—customary or statutory. Bees, wild geese, cattle—for instance, have customary rules of action in relation to each other. We often have very wrong ideas about savages. They are not anarchists, free from all law and customary rule. On the contrary even the lowest tribes have very strict regulations for all usual contingencies, and the individual gets nervous and alarmed when he does not know what to do and is without guidance. Civilized men are rarely bound as strictly as savages, and among the former anarchy abounds. We naturally respect authority and instinctively obey. All business, as well as that of war, is carried on under discipline by definite rules. Even children in their games invent a set of rules to govern them. There are some persons always violating rules and defying laws. They have a strong individuality and revolt against social ties. These are not insane although eccentric. They are anarchists, and we have them always with us They often seem that ethical considerations have no application to them. For the safety of the law-abiding people these anarchial persons have often to be restrained of their liberty or punished. In a great many ways the social anarchist and the insane act similarly and from like motives. But the criterion to distinguish them is the presence of cerebral disease.

Everyone will admit that the same anarchist is punishable for crime. But is the insane crime-perpetrator to be treated with impunity? It seems to me that he is not irresponsible. He is not to be exempted from punishment because he is partially or temporarily insane. It would be for the advantage of the community if insane murderers, for instance, were to be punished—the insanity to be pleaded in mitigation. Every case of crime committed by an insane patient should be investigated as if his responsibility were to be taken for granted until it is in the special case disproved. And the notion that the insane are irresponsible should no longer be retained.

ENTER PATIENT.

The morning mist still haunt the stony street;
The northern summer air is shrill and cold;
And lo, the hospital, grey, quiet, old,
Where Life and Death like friendly chafferers meet.
Thro' the loud spaciousness and draughty gloom
A small, strange child—so aged yet so young:
Her little arm besplint and besplung,
Precedes me gravely to the waiting room.
I limp behind, my confidence all gone.
The grey-haired soldier porter waves me on,
And on I crawl, and still my spirits fail;
A tragic meanness seems so to environ
These corridors and stairs of stone and iron,
Cold, naked, clean—half workhouse and half jail.—HENLEY.

WAITING.

A square, squat room (a cellar on promotion),
Drab the soul, drab to the very daylight;
Plasters astray in unnatural-looking tinware;
Scissors and lint and apothecary's jars.
Here, on a bench a skeleton would writhe from,
Angry and sore, I wait to be admitted:
Wait till my heart is lead upon my stomach,
While at ease two dressers do their chores.
One had a probe—it feels to me a crowbar.
A small boy sniffs and shudders after bluestone.
Life is (I think) a blunder and a shame.—HENLEY.

INTERIOR.

The gaunt brown walls
Look infinite in their meanness.
There is nothing of home in the noisy kettle,
The fulsome fire.

The atmosphere
Suggests the trail of a ghostly druggist.
Dressings and lint on the long, lean table—
Whom are they for?

The patients yawn,
Or lie as in training for shroud and coffin,
A nurse in the corridor scolds and wrangles.
It's grim and strange.

Far footfalls clank.
The burn waits with his head unbandaged.
My neighbor chokes in the clutch of chloral.
O, a gruesome world!—HENLEY

Medico-Legal Bulletin.

PUBLISHED MONTHLY BY THE
PHYSICIANS DEFENSE COMPANY
Fort Wayne, Indiana

VOL. 4 DECEMBER 1905 No. 3

THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

$1.00 Per Annum SUBSCRIPTION RATES **Single Copies 15c**

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MENTAL DISEASE RELIEVING FROM CRIMINAL RESPONSIBILITY.

The Supreme Court of Georgia holds, in Allams vs. State, that where the accused on trial for murder relied on the defense of insanity at the time of the homicide, it was not error to instruct the jury that the burden was on him to show "that at the time of the killing he was not of sound memory and discretion. He must show this not beyond a reasonable doubt, but to the reasonable satisfaction of the jury, by a preponderance of the evidence." Nor was it error on the trial of such a case to charge the jury that, if the accused had been shown to be insane prior to the date of the homicide, the presumption would be that he continued to be insane, "and the burden of proof would be on the state to show to the reasonable satisfaction of the jury, by a preponderance of the evidence, that at the time of the alleged homicide the defendant was of sound memory and discretion."

The rule of law in force in Georgia which relieves one from criminal responsibility for the commission of an unlawful act on account of mental disease is: If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule is where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, his will is overmastered, and there is no criminal intent, provided that the act itself is connected with the peculiar delusion under which the prisoner is laboring. It follows, therefore, that it was not

accurate to charge as follows: "The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates an individual from distinguishing between right and wrong as to the particular act in question, and of being mentally incapable of choo - ing to do or not to do the alleged act, and governing his conduct in accordance therewith." To relieve one from criminal responsibility on account of mental delusion for the commission of an unlawful act, it is not necessary that he be incapable of distinguishing right from wrong as to the particular act in question, and also incapable of choosing to do or not to do such act, and of govern ng his conduct in accordance therewith.

ALCOHOLIC COMPOUNDS LABELED AS MEDICINES.

The United States Commissioner of Internal Revenue says, in Internal Revenue Circular No. 673, dated Sept. 12, 1905, addressed to collectors of internal revenue, with regard to alcoholic compounds labeled as medicines and held out to the public as remedies for diseases.

Among the various alcoholic compounds now on the market, advertised and sold under the name of whisky, bitters, tonic, cordials, etc., there are some that are composed chiefly of distilled spirits, or mixtures thereof without the addition of drugs or medicinal ingredients in sufficient quantities to change materially the character of the alcoholic liquor.

The fact that these compounds during the existence of the statute imposing tax on proprietary medicines were without the necessity of investigation into their character by the terms of the law made subject to that tax, because they were held out to the public as medicines, does not afford ground for relieving the manufacturers from special tax as rectifiers and liquor dealer, or dealers therein from special tax as liquor dealers under the provisions of Section 3244, Revised Statutes and amendments.

It is held that the statute requires the exaction of this special tax from the manufacturer of every compound of distilled spirits, even though drugs are declared to have been added thereto, when their presence is not discoverable by chemical analysis, or it is found that the quantity of drugs in the preparation is so small as to have no appreciable effect on the alcoholic liquor of which the compound is mainly or largely composed.

The same ruling applies to every alcoholic compound labeled as a remedy for diseases and containing, in addition to distilled spirits, only substances or ingredients which, however large their quantity, are not of a character to impart any medicinal quality to the compound; but where substances undoubtedly medicinal in their character are combined with whisky or other alcoholic liquor, and are used in sufficient

quantity to give a medicinal quality to the liquor other than that which it may inherently possess, such compound is, of course, not to be included in this ruling.

The question, in each case, arising under the terms of this circular will be determined by this office, not merely on examination of the formula submitted by the manufacturer of the compound, but on result of the analysis in the chemical laboratory here of samples obtained in the open market and sent in by the local internal revenue officers and agents.

The ruling as to these compounds in the fourth paragraph of Circular No. 608 (Treasury Decisions, 1901, Vol. 4, p. 210), "that if they are composed of spirits in combination with drugs, herbs, roots, etc., and are held out as remedies for diseases stated in labels on the bottles, they are to be regarded as medicines until the facts ascertained, as to the purpose for which they are usually sold or used, show them to be beverages, and until such facts are obtained druggists and merchants who sell these compounds in good faith as medicines only are not to be called on to pay special tax as liquor dealers on account of such sales," is hereby revoked.

But in order that no injustice may be done to these druggists and merchants who, without holding special-tax stamps as liquor dealers, now have in stock these compounds for sale as medicines, this circular will not be put into effect until Dec. 1, 1905.

Collectors will, however, immediately on the receipt of this circular send out notice to all druggists and merchants dealing in proprietary medicines in their districts who do not hold the requisite special-tax stamp as liquor dealers, that on and after Dec. 1, 1905, they will be required to pay special tax for selling the alcoholic compounds coming within the ruling now promulgated, even when they sell them in good faith for medicinal use only, never selling them as beverages, nor selling them knowingly to those buying them for use as beverages. (In this connection, see editorial Sept. 23, 1905).—J. A. M. A.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

CAN NOT RETAIN PRESCRIPTION.

(White vs. McComb City Drug Co.)

This is an action for damages because of the defendant (The Drug Co.,) refusing to deliver a certain prescription when filled and to return the prescription to the plaintiff after such refusing. The plaintiff alleges as an element to his damages, that he was sick and procured a prescription from a physician and sent it to the defendant to be filled. That because of the defendant refusing to refill the same and return the said prescription, he was compelled to wait for six hours to get another prescription, and paid an additional sum of $2.50.00.

The defendant sets up by way of answer, that when the plaintiff sent the prescription to the defendant, they received the same and filled it, and offered and tendered to the messenger who brought it the medicine as compounded, upon the payment of reasonable and customary price, and that the said prescription there became and was a record of the defendants, and the plaintiff after same being filled, had no right to demand and take possession of the same, and that the plaintiff there and then refused to pay the said price demanded by defendant and refused to receive said medicine. The court over-ruled a demurrer to this answer. In its opinion the court says, "The gravamen of the declaration, as we read it, is the action of the defendants in willfully, knowingly and oppressively and in total disregard of plaintiff's rights refusing to deliver to the plaintiff his prescription, after having will fully and oppressively refused to fill the same, claiming as a reason that the plaintiff owed them a bill. If this is not tort both willfully and oppressively, it would be difficult to conceive one. Plaintiff would be entitled on the facts stated, to a judgment for such sum as the jury would find under proper instructions as to the measure of the damage."

The plea of the defendant is insufficient in that it seeks to justify defendants in refusing to give plaintiff his prescription upon the ground that they had compounded the medicines called for in the prescription and tendered them to the plaintiff who refused to pay the price demanded, and that the prescription had been compounded and filled,

it became a record of the defendant, and plaintiff had no right to demand or take possession of the same. It may be apothecaries after filling a prescription and delivering the medicines, have an absolute right to retain the prescription as a record of their business. Upon the point stated, the court expresses no exclusive opinion, but cannot consent to the proposition that an apothecary who has refused to deliver the medicines called for in the prescription because the party presenting it is unable or unwilling to comply with the terms as to payment, can retain in his possession the prescription against a demand for its return. When a prescription is presented they can easily ascertain before compounding the medicine whether their terms as to payment will be filled, If the medicines are not delivered, they can have no need of the prescription as a record of their business, or as an instrument of evidence. Having received a prescription we think they should either deliver the medicines, or return the prescription.

DRUGGIST LICENSE—UNLAWFUL PRACTICE.

(State vs. Abraham 61 Ala. 766.)

The proceedings for the unlawfulness of pharmacy under Statute 4662, providing that it shall be unlawful for any person not licensed as a pharmacist to practice pharmacy, or to indicate in any manner that his place of business is used as a pharmacy, or "to expose for sale at retail, any drugs, chemicals or poisons" unless such place of business shall be conducted, managed or controlled by a licensed pharmacist in accordance with the provision of the act. The amendment of this chapter provides that nothing in the chapter shall be construed to apply "to the sale of drugs, medicines and poisons" by dealers in general merchandise. It is claimed that this provision creates an unjust discrimination between merchants and other unlicensed dealers in drugs.

The court in its opinion says, "we think the discrimination can not be sustained." The general purpose of the chapter is to secure the safety of the public, and any discrimination in favor of a particular class of dealers must be based upon some difference that has a just relation to that purpose. If unskillful and incompetent owners of pharmacies cannot be trusted to sell drugs, medicines and poisons at retail, there is no apparent reason why dealers in general merchandise should be permitted to sell them.

The amendment also provides that the chapter shall not apply to the widow of a registered pharmacist, or the administrator of the estate of a deceased registered pharmacist. This exception may have had its origin in some idea regarding the necessity of a sale in the settlement of estates, but the provision is so sweeping that it authorizes unskillful persons to do, without limitation as to the time or stock, everything that is prohibited to other owners of like property. This

exception is clearly within the reason given in disposing of the previous point.

It remains to determine how much of the chapter must be eliminated to relieve it of this objection. We think the entire section should be stricken out, and will not interfere with the chapter, and the clause which relates to dealers in general merchandise is unconstitutional and void.

LICENSE—TO WHOM STATUTE APPLIES

(State vs. Lee, 82 Pac. 229 Nevada.)

This is an appeal for a writ of mandate to be directed to respondent requiring him, as secretary of the state board of medical examiners to require him to issue to appellant a temporary certificate entitling the appellant to practice medicine and surgery in this state until the next regular meeting of the state board of medical examiners. The relator claims to be qualified to have issued to him by the state board of medical examiners a certificate entitling him to practice his profession in Nevada, under the provisions of Section 4 of the act, "Creating the state board of medical examiners of 1899, which act authorizes the Sect. of the state board to issue to him a temporary certificate entitling the relator to practice until the next regular meeting of the board. The only question presented is whether or not the provisions of the act of 1899 have been repealed by the act of 1905. The later act contains no provision for granting a temporary certificate to applicants to practice medicine, surgery or obstetrics, the position maintained by the counsel for the applicant is that there is nothing in the provision of the act of 1899 authorizing the issuance of temporary certificate by the Sect. of the board which is not in conflict with the provision of the act of 1905.

After discussing the different rules of statutory construction the court says, even if the rule we have held governing in this case were not applicable, nevertheless, the appellant could not prevail, for the reason that the provisions of the act of 1899 relative to the granting temporary certificates are in conflict with certain of the provisions of the act of 1905. The act of 1905 provides that it shall be hereby unlawful for any person or persons to practice medicine or surgery or obstetrics in this state without first obtaining a license so to do as hereinafter provided. The statute further provides, "after this law goes into effect, any person desiring to practice medicine, surgery or obstetrics or any of the various branches of medicine, in this state, shall, before beginning to practice, procure from the state board of medical examiners a certificate that such person is entitled to practice medicine, surgery of obstetrics in this state." If under the provisions of the act of 1905 it is necessary to obtain a license from the state board of medical examiners before lawfully becoming entitled to practice, how can it be argued that one can also be lawfully entitled to practice upon a cer-

tificate issued simply by the secretary of the board, and upon the issuance of which the state board has not passed? The act of 1899 did not contain any similar provision making it incumbent to obtain a license from the board of medical examiners before beginning the practice.

It is argued that, as only two regular meetings of the board are provided for per annum, a construction of the statute as here given will impose a great hardship on those seeking to enter the practice between such regular meetings, and to impute such intention upon the legislature would be unfair to that body. Doubtless the legislature in the passage of the act in 1905 was considering the public good, rather than the convenience of private individuals; but the legislature also doubtless intended to obviate the inconvenience that applicants to practice might experience from being unable to obtain temporary certificates by the provision not found in the act of 1899, permitting special meetings of the board to be held at the call of the president of the board upon two weeks published notice.

PRACTICE OF MEDICINE—LICENSE.

(Hooper vs. Batdorff, 104 N. W. 667.)

One Griswold had been practicing medicine prior to September, 1903, in violation of public act 99, Page 366, No. 237, but not having been registered as thereby required. In Sept. of 1903, act 191, of that year took effect, the same being amendatory to the act first cited. Griswold had since continued to practice medicine without any effort to comply with such laws. On January 23, 1905, the relator presented a sworn complaint to the respondent, requesting him to file same and to issue a warrant for said Griswold. This was refused, and the relator applied to circuit court for a mandamus to compel it. The return of the justice shows that Griswold had practiced in Battle Creek continuously from Dec. 1902, without being registered under the act. The act provided that "on and after after the second Tuesday of October, 1899, all men and women engaged in the practice of medicine and surgery in any of its branches and all who wish to begin the same in this state, shall make application for certificate." This act was amended to read, "On and after the date of the passage of this act, all men and women who wish to begin the practice of medicine or surgery in any of its branches in this state shall make application to the state board of registration in medicine to be registered and for a certificate of registration." It was contended on behalf of Griswold that he did not fall within the terms of the provision for the reason that, inasmuch as he was already engaged in practice, though in violation of law, it cannot be said that he, "wished to begin the practice."

Attention is called to the fact that the act of 1899 required all persons engaged in or who wished to begin the practice to make applica-

tion, etc., while the amendatory act omits the former class, thus apparently limiting the law to cases of beginners in practice. We think this inconsistent with the legislation upon the subject. Considering these several acts, it is reasonable to believe that in 1899 the legislature took it for granted that practitioners then engaged in business, had complied with the law in 1899 and that it was not the design to compel them to again make application. We cannot believe that they deliberately intended to offer a premium to law breakers, which is the effect of respondent's contention. It is more reasonable to say that such a man is a beginner for the purpose of making such an application not being already a lawful practitioner. The writ of mandate is ordered issued.

PHYSICIANS FROM OTHER STATES IN MINNESOTA.

Chapter 236 of the General Laws of Minnesota provides that the state medical examining board, either with or without examination, may grant a license to any physician licensed to practice by a similar board of another state, and who holds a certificate of registration showing that an examination has been made by the proper board of any state in which an average grade of not less than 75 per cent. was awarded the holder thereof, the said applicant and holder of such certificate having been at the time of said examination the legal possessor of a diploma from a medical college in good standing in this state, which said diplomamay be accepted in lieu of an examination as evidence of qualification. In case the scope of said examination was less than that prescribed by this state the applicant may be required to submit to an examinatinion such subjects as have not been covered. The fee for such examination shall be $50.

A certificate of registration or license issued by the proper board of any state may be accepted as evidence of qualification for registration in this state, provided the holder thereof was at the time of such registration the legal possessor of a diploma issued by a medical college in good standing in this state and that the date thereof was prior to the legal requirements of the examination test in this state.

If by the laws of any state or the rulings or decisions of the appropriate officers or boards thereof, any burden, obligation, requirement, disqualification of disability is put on physicians registered in this state or holding diplomas from medical colleges in this state which are in good standing therein, affecting the right of said physicians to be registered or admitted to practice in said state, then the same of like burdens, obligations, requirements, disqualifications or disability shall be put on the registration in this state of physicians registered in said state or holding diplomas from medical colleges situated therein.—JOUR. OF AMERICAN MEDICAL ASSOCIATION, Nov. 11, 1905.

EXPERT MAY CONFIRM OPINION.

(Commonwealth vs. Snell, 75 N. E. 75, Mass.)

In an action for murder, a physician, Doctor Duck, was introduced as an expert witness and allowed to testify that he was confident in his opinion as to the cause of death, and that he believed if an autopsy could have been held at an earlier time, it would still more positively have confirmed his opinion. The court held this evidence admissible for the reason that it was simply a reaffirmation of the experts opinion in stronger terms.

EVIDENCE—STATEMENTS OF COMPANIES ATTORNEY ADMISSABLE.

(Birmingham Ry., L. P. Co., vs. Rutledge 39 So. 338.)

This is an action for personal injuries received while a passenger on the defendant's street railway. During the course of the trial, Dr. Jones, a witness for the defendant was introduced and testified that he was directed by the defendant to examine the plaintiff after the injuries were received, and that he found that the plaintiff's injuries were slight. On cross-examination the witness was asked what Mr. Morrow, (the defendant's attorney) said to him at the time he sent the witness to see the plaintiff. To this question the defendant objected, the court overruled the objection, and the defendant excepted. The witness answered, "he told me to go there and see his condition—his true condition."

The court said in its opinion of the testimony of Dr. Jones as to what Mr. Morrow said to him when he sent the witness to see the plaintiff was properly admitted on the cross-examination of that witness, as tending to show a bias favorable to the defendant.

DENTISTRY—WHAT IS PRACTICE OF.

(State vs. Newton, 81 Pac. 1002 Washington.)

The appellant was prosecuted upon an information charging him with practicing dentistry, in that he did "treat a disease and lesion of the human teeth and did correct malpositions of the human teeth and jaws of one."

It is contended by appellant that the acts testified to did not constitute the practice of dentistry, as alleged in the information. Did the taking of the impression, the making of false teeth, and the fitting thereof in the mouth constitute a correction of a "malposition" or of "malpositions" of the jaws? This is the question. As to whether or not making the teeth or taking the impression would, each separately or together, constitute this, we do not decide. But taken together with the actually fitting and adjustment to the jaws, we hold that it constitutes a "correction of malposition of the jaws," within the meaning of the statute.

OPERATION TO IMPROVE APPEARANCE AFTER INJURY.

The Supreme Court of Oregon says that in the personal injury case of Busch vs. Robinson, where the plaintiff's hand was caught between the rollers of a mangle, a physician, after describing the extent of the injury, and that there was a webbing of the fingers down to the middle joint, testified that the cosmetic effect of the hand would be improved by an operation dividing the fingers again so that the woman could wear a glove; that, while it would probably not improve the usefulness of the hand, it would much improve its appearance; and that the seasonable charges of a surgeon for performing the operation would be about $100. He further testified, over objection, that it would be better for the plaintiff to go to a hospital during the operation and treatment, and that the expense there would be $2 a day for about thirty days. The objection to this testimony was that the expense attending the further treatment of the hand to improve its appearance was not a proper element of damages for the jury's consideration. But the court says that it would seem that the operation or further treatment and the expense attending it would be but the natural and probable result of the injury—as much so, almost, as it was necessary to employ a surgeon in the first instance to secure proper treatment for saving the hand, if possible. It was, therefore, within the rule for the measure of damages.—CURRENT MEDICAL LITERATURE.

MEDICAL INSPECTOR SUED.

Mary Fay has begun suit for $1,000 damages against Dr. Alfred C. Marshall, an assistant medical inspector of Philadelphia. She charges that when her youngest daughter was taken ill last July, Dr. Marshall was called in and diagnosed the case as diphtheria, and the child was sent to the Municipal Hospital. The inspector then put a diphtheria quarantine notice on the rear fence, and at the front of the house "negligently, carelessly, or willfully" put up a smallpox warning. Mrs. Fay denies that her child had smallpox, and, as it was discharged from the Municiapl Hospital in a few day , she contends that it is even doubtful whether it had diphtheria.—AMERICAN MEDICINE.

INJURED PHYSICIANS MAY TESTIFY AS TO EARNINGS.

The Supreme Court of Missouri says, in the case of Sluder vs. St. Louis Transit Company, where a physician was incapacitated to practice his profession for eleven and one-half weeks by a collision of a street car with a carriage in which he was riding, that no reason was stated why it was not competent for the physician himself to testify what his actual monthly practice averaged him. It was not guesswork, but actual knowledge, to which he was testifying It was not remote, but the value of his profession to him for the immediate months

during which he was disabled, and the court agrees with him that the best evidence was the actual earnings of the month in which he was injured. In other words, the court holds that there was no error in permitting him to testify to his earnings for the corresponding months of the previous year.

BAR "MEDICAL" COMPANIES.

The Postoffice Department has issued a sweeping order debarring from the mails a number of Philadelphia individuals and "companies" who pretend to be legitimate medical practitioners and institutions, but investigation of whose business has revealed their fictitious character. Those debarred by the order are: Dr. and Mrs. Wallace, French Remedy Co., Mrs. Dr. Gordon, Dr. Revere, Dr. J. Henry King, Mrs. Dr. Davis, Mrs. Butz, Mrs. Wilson, Dr. Garmo Company, Dr. Rober, Dr. Rogers, Dr. and Mrs. Good, S. Regan, Atlantic City. In the opinion of the department officials, this order will effect the closing of all such offices in Philadelphia.—AMERICAN MEDICINE.

"MAIL ADVICE PHYSICAN" SENT TO JAIL.

Dr. Thomas Wallace was sent to jail for nine months for sending improper literature through the mails. A fine of $100 was also imposed. This was the first conviction in the crusade of the postal authorities against the use of the mails in advertising illegal operations. Several socalled "doctors" are under arrest, and will be arraigned for trial at the next term of court. Postal Inspector Malone wrote Wallace a test letter in the name of a woman from Altoona, and received advice and a circular. Wallace was sent a postal money order for some medicine, and as a result of further investigation he was placed under arrest. He protested that he did not know his business was illegitimate.—AMERICAN MEDICINE.

A Los Angeles woman physician advertised widely to cure cases of cancer and, on account of such advertising, her certificate was revoked by the California State Board of Medical Examiners. One of the provisions of the California medical practice act is that a certificate may be revoked if the holder is guilty of uttering grossly improbable statements in regard to his or her healing powers. The disbarred physician will now take action in Court to prove that her assertion that she can cure cancer is not "a grossly improbable statement." The California courts may now meditate and decide if cancer is curable by the methods of the enterprising Los Angeles physician.—AMERICAN MEDICINE.

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JANUARY 1906

MEDICO-LEGAL BULLETIN.

Vol. 4 No. 4

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PUBLISHED BY
PHYSICIANS DEFENSE CO.
FORT WAYNE, IND.

We wish to thank our contract holders, who, by their co-operation and patronage, have made it possible for us to present the magnificent record shown on opposite page. Allow us to repeat our contention made six or seven years ago when we originated the protection of the medical practitioner: "Our plan is built on *principle*; it is for the reputable practitioner; it will eliminate blackmail."

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Yours for success,

P. D. Co.

See article on page 103

Medico-Legal Bulletin.

RELEASE FROM TECHNICAL ASSAULT.

The growing importance to the physician and surgeon of some protection against claims of patients for technical assault or operation without consent is coincident with the development of surgery. We have often discussed the elements of technical assault. Until 1904, there never was a case decided by a court of last resort which involved a discussion of this question. Occasionally there was a suit filed but none of them ever reached the Appellate Court. Since then there have been several opinions written in cases brought to recover damages for this violation of the physician's duty.

It appears from a consideration of the recent decisions that the gist of the question is not whether in performing the operation complained of the care and skill required of the surgeon was used, but whether or not the operation complained of was performed with the consent of the patient. The consent is therefore the vital thing in the case. The theory of the law is that one has an absolute right to the enjoyment of his person and may claim absolute immunity from the violation of that right. The state guarantees this privilege to every citizen so long as he enjoys it in a way which is not inconsistent with the rights of the state to the life and energy of its citizens. Thus any touching of the person of another without his consent and not in the spirit of pleasantry is a violation of the immunity guaranteed to every citizen and upon which may be predicated the right to recover damages, dependant, of course, on the result and the nature of the unauthorized act.

The developments of the medical science in recent years has been towards exactness in the diagnosis and treatment of disease. While the practitioner does not pretend to exactly and accurately diagnose every ailment of every patient presented for his consideration, he has made marvelous strides in a scientific way toward diagnosing diseases. The fact that surgical operations are successfully performed for the relief of diseases and ailments not heretofore known to exist, certainly sustains the assertion that medical science is developing scientific exactness. What may be called a blanket diagnosis is no longer heard of among the better class of practitioners. There is some effort made

to ascertain the exact difficulty and to relieve the cause. Along with this development has been some certain scientific standards in the diagnosis and in the treatment of diseases. Schools of medicine and methods of treatment have become recognized and established so that the treatment in any given case can be tested by science. This holds the practitioner to a greater degree of accountability. One of the first things required of him by his patient is that he decide what the ailment is as well as foretell the conditions existing and what he will undertake to do for their relief. When his work is questioned he has not the scope of defense once possessed by the medical practitioner. He can not set up his own theories and his own beliefs for the purpose of sustaining his conduct. The court compels him to submit himself to the standards of the science he professes to practice. He is not bound by the highest rules of proficiency nor can he invoke the standards of the lowest; what he must do is to show that he has used the average knowledge and skill used by the reputable men of his profession.

To illustrate my meaning I will refer to the case of Commonwealth vs. Thompson, which was decided in the state of Massachusetts, 1809, and is reported in the 134 Mass. Reporter. Thompson, the defendant, professes to be a physician with a school of his own, called the Botanic School, and professed to cure any kind of fever, black, green, gray or yellow, by the use of a certain poison administered to his patient. E. L. unfortunately fell into his hands, and after absorbing considerable of the quack's supposed medicine, he gave up the ghost.

Thompson was indicted for murder. The court said in substance: To constitute manslaughter, the killing must have been the consequence of some unlawful act. Now there is no law which prohibits a man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription. It is not a felony, if through his ignorance of the quality of the medicine prescribed or of the nature of the disease, the patient, contrary to his expectations, should die, if the physician, whether licensed or not, gives a person a potion without any intent of doing him any bodily hurt, but with the intent to cure or prevent a disease, and contrary to the expectations of the physician it kills him, he is not guilty of murder or manslaughter.

While this is true in theory, the standards by which Thompson was judged were those set up by himself. He testified that he had cured a few patients, or at least a few patients had survived his treatment, and consequently he believed that his treatments, notwithstanding they were contrary to the then known laws of science, were correct and proper. In the light of the recent decision relative to Christian Science, it would appear that the standards by which the defendant would be judged, would not be those set up by himself as to what he may or may not believe, but would be the standards of medical science, and if he would pretend to practice the art of adminis-

tering for the relief of patients, he should himself be governed by the scientific standards recognized in that profession.

Owing to this development, I say that the medical practitioner is held to a greater degree of accountability. He has set up his standards for himself and the law requires that he conform to them, notwithstanding all of our scientific development, diagnosis is often, because of the conditions surrounding the patient, inexact. Every physician or surgeon of any experience knows that the conditions often found to exist after the abdomen of a patient has been opened, are revelous. A discovery of this unexpected condition makes unexpected operations advisable if not necessary. and this gives rise to the probability, as well as the frequency, of an operation without the consent of the patient and in its nature exploratory. It would seem that since a physician and surgeon is required to use that degree of care and skill used and maintained by the averaged practitioner, that he would also, after a patient had once placed himself in his hands for treatment, be allowed to administer such treatment and perform such operations as he may find necessary or advisable, regardless of the knowledge or consent of the patient. The recent decisions, however, clearly established that such is not the rule of law. As said in Pratt vs. Davis, under a free government, the free citizen's first and greatest right, which underlies all others, is the right to the inviolability of his person—the right to himself. And this right necessarily forbids a surgeon or physician, however skillful or eminent, who has been asked to examine, diagnose, advise or prescribe, to violate without permission, the bodily integrity of his patient by a major or capital operation on him without his consent or knowledge. In Mohr vs. Williams, 104 N. W. (Minn.) 12, it was held that a patient must be the final arbiter as to whether he will take his chances with the operation or take his chances of living without it. Such is the natural right of the individual which the law recognizes as a legal one. The consent, therefore, of an individual must be expressly or impliedly given before a surgeon may have the right to operate. From this discussion our conclusions must be that consent is absolutely necessary for the purpose of authorizing an operation.

The Physicians Defense Company is interested only in the defense of the medical profession against suits for civil malpractice. Recently we have observed the growth of actions for damages brought against physicians based on technical assault or operations without consent. Considering that the prevention of malpractice suits is of the greatest importance to the profession it has recently prepared a form of authorization and distributed it among its contract holders. It is as follows:

I, the undersigned, having engaged..... ....., physician and surgeon, to administer certain medical and surgical treatment, hereby consent to and authorize the administration and performance of said treatment and operation, and any further or

additional treatments ond operations that may be, in the judgment of said physician, considered or deemed advisable or necessary, at the time the contemplated treatment or operation is being performed. The intention hereof being to grant authority to administer and perform all and singular any treatments or operations to or upon me which may now, or during the contemplated services, be deemed advisable or necessary.

Signed.... ....

.. .., 190..

I consent to the above..... ....

....., 190..

Witness..... .

Either husband, father, guardian, mother or next of kin should sign.

This authorization, if signed by the patient, will release the physician from any claims of technical assault. It attempts to specify and give the physician or surgeon power to perform such operations and administer such treatments as may be deemed advisable or necessary, regardless of the operation or treatment originally specified to be performed or administered.

It is not pretended that a patient's signature to this memorandum would be necessary or even advisable in every case. The patient may by his whole course of conduct, without the use of any express language giving his consent, place his body at the entire disposal of the physician or surgeon. For instance, if a soldier would go to war, and into battle, with the knowledge beforehand, that surgeons attached to the army were to have charge of the wounded, he would thereby be considered to have impliedly authorized such operations and treatments as the physician or surgeon in good faith would perform.. In various cases of sudden and critical emergencies the surgeon would be held justified in a major or capital operation without the express consent of the patient. Reasonable latitude must be allowed the physician and surgeon in critical cases. No rule is laid down which would reasonably interfere with the exercise of his discretion or prevent him from taking such measures as his judgment dictates for the welfare of his patient in case of emergency. If the person should be injured to the extent of rendering him unconscious and his injuries were of such a nature to require prompt surgical attention, a physician called to attend him would be justified in applying such surgical and medical treatment as might reasonably be necessary for the preservation of his life or limb and consent on the part of the injured person would be implied.

Again, if in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which if not removed would endanger the life of a patient, but for which no express consent was implied or given, he would be justified in removing them. These are

not the cases, however, which presents the difficulty, nor are they the ones in which the memorandum presented herein is intended to be used. The cases which cause the real difficulty are those in the borderland of consent and not within the contemplated treatment or operation. The cases which will illustrate our meaning are first, the one decided in Minnesota, known as the Williams case. In this case the patient was supposedly afflicted in her right ear, and the defendant, a surgeon, according to evidence in the case, pronounced the left ear to be sound. After the patient had been taken to the hospital and an anesthetic administered, it was discovered that the real difficulty existed in the left ear, and that, in his judgment it would be more advisable to operate on the left ear than on the right ear. The operation was performed on the left ear. The plaintiff complained that such operation was performed without her consent and she brought suit for damages. The court in its decision said in substance: If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks of its performance, and finally consents, he thereby, in affect, enters into a contract with the physician authorizing him to operate to the extent of the consent given, but no further. It is not, however, contended by the defendant that under the circumstances of this case, consent was implied, and it was not an emergency case, such as authorizes the operation without express consent. The physician impliedly contracts that he will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would give to him free scope in performing surgical operations. The diseased condition of the plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but after an independent examination of that organ, made after the authorized operation was found necessary.

The other case referred to is the case of Pratt vs. Davis, in which it was held that a general retainer of a physician or surgeon to treat a patient, does not give an implied authority to perform any and all operations which may be deemed advisable by him.

Another phase of the question may arise in the instance of procuring a consent of authority from the husband or guardian or person standing in locoparentis. The marital relation makes the husband the head of the family. This, however, does not extend so far as to give him absolute authority in consenting to or refusing to permit medical and surgical treatment. Since, however, he has certain qualified rights in the interest of his wife and children, his consent under some circumstances may be advisable if not necessary. The case of Janey vs. Housekeeper, 70 Md. 162, qualifies the authority of the husband to sue

because of an operation performed on his wife without his consent. If, however, the wife was unable to give consent, she being an imbecile, or a person under disability, the husband's consent might be necessary in order to bar him from his right of action for loss of services, society, etc. The same rule of law would apply to a guardian, mother or next of kin, as the circumstances of the case would appear. For this reason we have appended to the proposed consent, set forth herein, the signature of persons standing in these positions respectively.

We mean this memorandum as an aid to the protection of the medical profession. It is hard to anticipate the different attitudes patients will assume. If the treatment is successful, the patient is generally satisfied. If, however, the treatment is unsuccessful, chagrin and disappointment fills the minds of the patients, and suits for damages are generally the outcome. The laity have a mistaken impression that a physician and surgeon undertakes to cure, and if such is not the result of the treatment administered, they are considered to have fallen short of their contract.

(We have padded and printed the form for "Consent to Operation." They can be filed with other matter relative to the operation, for the surgeon's future needs, should occasion require. We will furnish the same to our contract holders upon application.')

HAS A MINISTER OF THE GOSPEL THE RIGHT TO REFUSE TO PERFORM A MARRIAGE CEREMONY?

The divorce evil is very properly receiving the renewed attention of religious bodies. We are informed that many of the leading denominations do not allow their ministers to marry persons previously divorced on other than Scriptural grounds, and that many individual ministers of other denominations have prescribed the same rule for their own conduct. It is, therefore, getting more difficult for divorced persons to secure a minister of standing to perform the marriage ceremony.

The question, therefore, arises as to whether a minister has a legal right to refuse to marry a person who is marriageable under the laws of the land. The law treats marriage simply as a civil contract, and a minister in the performance of the ceremony is acting in the capacity of a public civil officer.

The fact that the minister makes the ceremony of a religious nature does not change its legal aspect, for a perfectly valid marriage may be performed without any religious ceremony whatever.

In Virginia there is no such thing as a common law marriage—that is, there can be no marriage except according to statute. Unlike some of the other states, the judges and justices are not by virtue of their offices authorized to perform the ceremony.

Indeed, no minister can perform the rite unless specially authorized to do so by the courts, in which case he is required to give bond for the faithful performance of his duties.

It would be an anomaly in the land, if an officer were allowed to refuse to perform an official function when the person applying for its exercise had in all respects complied with the law.

It is unfortunate that the laws of the state and those of the churches should be at variance; but it would seem that a minister in taking upon himself the duties of an officer of the law should be governed by the law. Or perhaps it would be better to say that a man should not accept from the state an office, the duties of which he can not conscientiously perform; or, having accepted such an office, he should resign when he finds such conflict exists.

It is true that in Virginia the courts may authorize persons other than ministers to perform the marriage ceremony, but, if the minister has the right to refuse to perform, because to do so would be to violate his conscience or to break the rules of his church, then any other officer would have the same right, unless, indeed, the minister's rights of conscience are more sacred than the rights of other citizens.

If the minister may refuse to marry persons legally marriageable, would it not be equally competent for the clerk of the court, for the same reason, to refuse to issue the marriage license?

It is no answer to say that, if one minister refuses to perform the ceremony, another minister or some officer may be applied to, for if one may refuse, so may all, and thus those appointed to perform a duty might usurp the legislative function and practically prescribe the prerequisites of marriage.

If the question is ever brought before the courts, it would be interesting to observe whether it is possible to avoid a clash between the law of the land and advanced Christian sentiment.—VIRGINIA LAW REGISTER.

A LEGAL OPINION ON THE ADOPTION OF FEES.

The Llano-Mason County Medical Society at its meeting in July adopted a fee bill. The following correspondence is self-explanatory:

AUSTIN, TEXAS, August 11, 1905.

LEE BRIDGES, Llano, Texas.

Dear Sir:—We are in receipt of yours of the 6th inst., enclosing the following price clipping:

At a meeting held at Castell, July 12, 1905, of the Llano-Mason Medical Society the following fee bill was adopted, to go into effect on and after August 1, 1905: (See schedule in another column.)

You desire to know if the action of the Llano-Mason Medical Society, in entering into an agreement fixing a schedule of fees, is a violation of the anti-trust laws of this State.

You are respectfully advised that Article 5313 of the Revised Statutes, Section 1, provides that a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons, or either two or more of them, for either, any or all of the following purposes, among which are:

(1) To create or that may tend to create or carry out restrictions in trade, or (2) to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

If the agreement entered into infringes the anti-trust statute of this State, it must fall within the terms of the above provisions.

First. The Supreme Court of Texas, in the case of Vueen Insurance Company et al. vs. The State, 86 Texas, 250, held that the word "trade" in the statute, as used, is synonymous with "traffic." In this sense it embraces the buying and selling of any article of commerce. The services of a physician is not a commodity that could become a subject of trade or traffic, within the meaning of those terms.

Webster's International Dictionary defines "traffic" as follows: "To pass goods and commodities from one person to another, for an equivalent in goods or money; to buy or sell goods; to barter; to trade." Hence, it is obvious that the agreement can not be held to be a combination to create or carry out restrictions in trade.

Second. Is the agreement a restriction in the free pursuit of any business authorized by law? Obviously this clause was intended to apply to such restrictions as grow out of combinations and acts whereby persons are hindered or prevented by force, intimidation, coercion, threats or other unlawful means from freely pursuing their vocation or business, and was not intended, nor does it apply to laborers or

professional men who may combine for the purpose of securing increased charges or fees for services rendered. Insurance Company vs. State, 86 Texas, 250.

It is not a restriction in the free pursuit of business for a person or combination of persons to refuse to render professional services for less than the value he or they place upon said services. A man has the right to value his own labor; the right of every man to refuse to work for, deal with or associate with any man or class of men, acting as he sees fit, is fundamental. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others, and in the right which one may exercise singly, many, after consultation, may agree jointly and make simultaneous declaration of their choice. This has been repeatedly held as to associations of workmen, and associations of men in other occupations or professions must be governed by the same principle. Commonwealth vs. Hunt, 4 Met., 11. Carew vs. Sutherford, 106 Massachusetts Moguel Steamship Company vs. McGregor, App. Cases, 25.

Under the agreement entered into by the members composing the Medical Society, if any restrictions to a free pursuit of business resulted it would merely operate as a restriction upon their own private business and would not interfere with the rights of the public or any others not a member of the association, nor does it prevent competition by other physicians not members of said society.

You are, therefore, advised that in our opinion the agreement referred to does not come within the terms of the anti-trust statute of this State. If agreements of the character named were inhibited, it would include labor unions which agree on the scale of wages, associations of farmers who agree to hold the fruits of their labors for a stipulated price, and would interfere and prevent the free exercise of other constitutional rights not subject to legislative control.

Yours very truly,

J. P. LIGHTFOOT,

Assistant Attorney General.

--TEXAS STATE JOURNAL OF MEDICINE.

PHYSICIANS' VISITING LIST—1906.

We have at hand the Physicians' Visiting List, "P. Blackiston's Son & Co." for 1906. This is the fifty-fifth year of the publication of this memorandum and from its completeness it would seem that there has been some profit in the experience. We could conceive of no neater Visiting List and we would especially commend the workmanship, as it bears every evidence of being able to withstand the wear and tear of the busy year that is to ensue.

BENJAMIN RUSH

(1745-1813)

Physician—Patriot

One of the illustrious characters of American History; born in Philadelphia; one of Shippen's earliest students in anatomy; graduated at Princeton in 1760; studied widely abroad; author of "Medical Inquiries and Observations," "Essays and Diseases of the Mind," and many other works of professional, political and philosophical value; an accurate observer of disease, his descriptions being classic and reliable; a founder of the Philadelphia Dispensary and College of Physicians; rendered heroic service during yellow fever epidemic of 1796; father of large family; devoted one-tenth of income to charity; treasurer of United States Mint; member of the Continental Congress; a signer of the Declaration of Independence.

The Statue, as shown on opposite page, was erected by the American Medical Association and unveiled June 11th, 1904, in Washington, D. C.

There being no picture of the monument available, the Physicians Defense Company had the same prepared and reprints will be furnished upon application.

Medico-Legal Bulletin.

PUBLISHED MONTHLY BY THE
PHYSICIANS DEFENSE COMPANY
Fort Wayne, Indiana

VOL. 4 JANUARY 1906 No. 4

THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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THE PROPHYLACTIC FEATURE.

The following clipping has a little history. The physician involved in the suit was presented with the usual "please compromise" letter by the patient's attorneys. The physician immediately forwarded to the matter to this Company and the attorneys were much surprised to find the physician prepared.

The clipping is not only an admission of their inability to cope with the physician but likewise confesses that they had no cause:

PUTS UP COIN.

Doctors Insured Against Action for Malpractice.

Physicians Defense Company Will Put Up $5,000 to Pay Expenses of Litigation Incurred by Members.

Through a case where a Burlington physician was to have been sued for damages by a patient, the existence of an organization called the Physicians Defense Company has come to light. There are all kinds of organizations which protect men, life insurance, fire and accident insurance, marine insurance and other kinds of insurance but a physicians' insurance company is a novelty.

This defense company gives each member who is insured protection from prosecution to the extent of $5,000; that is, if a physician is sued by a disgruntled patient this company will furnish funds to defend him without cost to the physician, until final judgment is rendered, or when all appeals on writ of error and all due process of law is exhausted or until $5,000 has been expended in any one suit or $10,000 in a series of suits. This practically takes the worry of defense off a physician's shoulders when suit is entered and also relieves him of the expense which would be incurred.

In the Burlington case the man who wished to bring suit against the physician is in no shape to put up $5,000 to match the money which this company can put up, therefore it will probably be impossible for him to sue. The presence of this company practically deprives a poor man of the hope of recovering damages from a physician for malpractice.

—Burlington Evening Gazette, Nov. 11, 1905.

NO TEMPORARY LICENSE.

It is not an uncommon practice for a physician to place in charge of his practice one who is not regularly licensed according to the act of assembly governing the practice of medicine in this state. Dr. Henry Beates asserts that the impression seems to prevail that such an appointment is not an infraction of the law. To show that such practice is illegal Dr. Beates has secured an official opinion from the attorney general of Pennsylvania concerning the subject, which is in part as follows:

"In my opinion this is not in accordance with the Medical Practice Act, which prevents one from opening an office and regularly establishing himself as a practitioner of medicine without having first qualified according to the statute. Duties of this character, requiring special qualifications and subject to government control as a part of the police power of the state, can not be assigned to unqualified persons. The mere fact that the assignment may last but a brief period does not alter the legal aspect of the case. The maxim of the law is qui facit per alium facit per se, and the agent in a matter of this sort must have the qualifications of the principal. I see nothing whatever in the law to prevent one qualified practitioner from calling on another qualified practitioner to take charge of his practice during his absence, but there is nothing whatever in the law which permits the substitution for a trained and duly qualified professional man of one who has not complied with the statute, and who, therefore, is not qualified to practice.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

PHYSICIANS LIABILITY FOR MANSLAUGHTER.

(Hampton et. al. vs. State, 39 S. Reporter 421 Fla.)

This was an action brought by the State against Hampton for manslaughter by inserting into the womb of one L. E. a certain instrument and thereby produces a large rent in her womb, all of which was alleged to have been done in an unskillful, culpable, felonious and negligent manner. The instrument used was not particularly described.

Hampton contended that since the indictment did not allege that while treating the deceased he was under the influence of intoxicating liquors that he could not be convicted under such indictment for the reason that section 2392 of the Revised Statutes provides as follows: "If any physician while in a state of intoxication shall without any design to affect death administer any poison, drug, medicine, or do any other act to another person which shall produce death of such other, he shall be deemed guilty of manslaughter." It was contended by Hampton that if he was guilty of any crime since he was acting as a physician and surgeon, the crime must come under the provisions of the foregoing statutes. The court, however, held that the information could be alleged under the statute on the subject of killing, the same being section 2384, and provides as follows: "The killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this article shall be deemed manslaughter, and shall be punished by imprisonment in the State prison not exceeding 20 years or imprisonment in the county jail not exceeding one year or by fine not exceeding $5,000."

The law seems to be fairly well settled both in England and America that where the death of a person results from the criminal negligence of the medical practitioner in the treatment of the cases the latter is guilty of manslaughter, and that the criminal liability is not dependant on whether or not the party undertaking the treatment of the case is a duly licensed practitioner, but merely assumes to act as such, acted with good intent in administering the treatment, and did so with the expectation that the result would prove beneficial, and that the real

question upon which the criminal liability depends in such cases is whether there was criminal negligence; that criminal negligence is largely a matter of degree, incapable of precise definition, and whether or not it existed to such degree as to involve criminal liability is to be determined by the jury; that criminal negligence existed where the physician or surgeon, or person assuming to act as such, exhibits gross lack of competency, or gross inattention, or criminal indifference to the patients' safety and that this may arise from his gross ignorance of the science of medicine or surgery and of the affect of the remedies employed, through his gross negligence in the application and selection of remedies and his lack of proper skill in the use of instruments, or through his failure to give proper instructions to the patient as to the use of medicines; that where a person treating the case does nothing that a skillful person might not do, and death results merely from an error of judgment on his part, or an inadvertent mistake he is not criminally liable.

The court held that the enactment of section 2392 was not designed to supercede or abrogate these well settled principles, nor repugnant to the section of manslaughter generally.

Dr. S., a witness for the State, was asked this question: "About how recent would you say to this jury that wound had been made in the womb? Within what time?" This question was objected to on the ground that an answer to the same would be a mere conjecture, possibility or probability. The court held the question admissible on the ground that the evidence called for was a material circumstance for the state to show the time when the deceased met with the wounds.

The witness was a medical expert and was competent to give his opinion from the appearance of the wounds. The following question was also asked: "If that larger omentum had been torn out through the womb, and had had blood on it, what would its color have been?" The question was objected to on the ground that it was leading and suggestive of the answer intended to be given. The objection was overruled on the ground that the description of the omentum as part of the intestines was sufficiently given. Dr. A. was asked the following question: "Upon an examination of a patient if you find several feet of her smaller intestines protruding through the vagina and should find rents in that woman's womb, one of which was large enough so the end of a finger of a man could come through and should also find that those intestines came through one of these rents in that womb, what would, in your opinion as a physician, cause that state of facts?" The court held that this question was admissible and within the province of a professional medical expert to express an opinion upon the same.

Dr. H. was asked the following question: "What in your opinion as a physician was used to make those two rents in the womb you have described? What kind of an instrument in your opinion?" The ques-

tion was objected to on the ground that the instrument was not sufficiently identified. The court held that the question was admissable. Dr. L. was asked this question: "In your opinion as a physician what instrument was used to make these injuries in the ureter and in the ovary that you have testified to?" Question objected to and the court held that the witness could express an opinion on the same and could select from several instruments the ones which would be used to make such wounds as testified.

The court charged the jury as follows: "The court charges you that a reasonable doubt is that state of the case which, after the comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty of the truth of the charge. (If you have a simple doubt you are not to acquit, but it must become a reasonable doubt, that is, conformable to reason, which would satisfy a reasonable man under all the facts and circumstances as testified to in this case). The last clause of this charge that we have enclosed in parentheses is erroneous for several reasons. A simple doubt as contradistinguished from an intricate or complicated doubt may be such reasonable doubt as would require an acquittal, indeed every reasonable doubt may be accurately said to be a simple doubt, and it is error to instruct a jury that it must not acquit if it is a simple doubt. The charge is erroneous, also, because it requires a reasonable doubt that justifies acquittal to be such a doubt, "as would satisfy a reasonable man, under all the facts and circumstances as testified to in the case. Satisfy the reasonable man of what? Of the fact that his mind was in the state of doubt, or satisfy him of the guilt or innocence of the accused? The charge does not at all tend to elucidate the meaning of the phrase "reasonable doubt," but on the contrary, confuses and beclouds the subject, and leaves the minds of the jury mystified and in a more unsatisfied state than they would be in laboring under a half dozen reasonable doubts

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OPINIONS MUST BE FOUNDED ON EVIDENCE.

(Elgin A. & S. Traction Co., vs. Wilson 75 N. E. 436 Ill.)

This action was brought for damages for personal injuries. Dr. S., witness for the appellee, was allowed to state his opinion as a medical expert, not based on a hypothetical state of facts, but, in part, upon the testimony of the appellee as a witness, as the doctor heard and construed her testimony. A physician or a surgeon who has treated a patient may express his opinion as to the physical condition of such patient, based on information gained while so administering professionally for the affliction, or a physician may testify as an expert from information obtained from a physical examination of the person who

is the subject of the inquiry. If the opinion of a physician is desired on the case made or claimed to be made by the testimony produced on the hearing, he should not be permitted to state his opinion based on the conclusion arrived at by himself as to the case made by the evidence as he heard it and gave it weight. The proper course is to state hypothetically the case which the party producing the witness thinks has been proved, and to ask an opinion based on such hypothetical case. The jury, who are the judges as to what has been proven, may then apply the opinion of the expert, if in their judgment the state of the case on which it was based has been proven. To permit the expert to base an opinion on the testimony as he construes and has weighed it would permit him to exercise the functions of the jury, and, in a sense, decide the whole issues for them.

Dr. S. testified that he had made two examinations of the person of the appellee and that he was present and heard her testimony as a witness. He was then asked, "In view of that, in view of the examination you have made, also in view of the symptoms you have discovered by means of your examination, what relation would you say, does her present condition bear to the injuries mentioned?" (Objected to on the ground that the question is not predicated on the testimony in the case). The ground of this objection is not entirely clear. The ground intended to be advanced may have been that it was improper to base an opinion on anything save the testimony heard by the expert and was improper because it asked for an opinion based also, in part, on the personal examination of the appellee. It may have been on the ground that it was improper because it was not predicated on all of the testimony in the case relative to the physical condition of the appellee. Giving to the objection either of these meanings if either ground of objection had been sustained, the correct rule would not have been applied.

EXEMPTION FROM CLAIM FOR FEES.

(Taylor vs. Barker, 95 N. Y. S. 474.)

The practical question presented in this case is whether the plaintiff whose claim is based on professional services rendered by a surgeon to the defendant's wife, is entitled to an execution against the wages of the defendant under the provisions of section 1391. The section provides that where a judgment has been recovered wholly for necessaries, or work performed, as a domestic, or for services rendered for a salary, and an execution has been returned unsatisfied, and any wages, etc., are due and owing to the judgment debtor, the court may afford the relief provided in the statute.

The court held that the claim for services rendered by a surgeon to defendant's wife is not within the statute.

See Vol. 23, Century Digest.

COMPETENCY OF WITNESSES.

The Supreme Court of Georgia says of a witness, in Macon Railway & Light Co. vs. Mason, that, had he been licensed under the laws of that state to practice medicine, he would have been competent to testify as an expert witness on the fact being made to appear that he was a licensed physician. But, generally, nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession. Knowledge gained by consistent and close study of medical works renders one competent to testify as an expert concerning the matters of which he has thus learned. It is not essential that he should be actively engaged in the practice of medicine. Nor is it essential that one who really has a scientific education on the subject should be a graduate of any medical college, or have a license to practice from any medical board. What he knows is what really qualifies him to express an opinion as an expert, and a diploma or license is only important as furnishing satisfactory evidence of his competency as a witness. Accordingly, a person who is neither a physician nor surgeon can express an opinion on a medical question, when the matter inquired about lies within the domain of the profession or calling which the witness pursues. But not being a licensed practitioner, it is necessary to lay the proper foundation showing him to be an expert as to the subjects on which he proposes to express his opinion.

The court also holds that the wife of an injured party is not, because of the marital relation existing between them, and the policy of the law to preserve inviolate the confidential communications between husband and wife, incompetent to testify as to the nature of the injury received by him, and its effect on his physical condition, when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife. The wife may testify to symptoms which she has observed indicating that her husband suffered from headache, but she should not be permitted to generalize or state any bare conclusion on her observation of others who had headache, she not professing to be an expert.

PRESCRIBING POISONS—MANSLAUGHTER.

(Nordan vs. State 39 S. 406 Ala.)

This was an action charging the defendant with murder. Dr. L. was examined as a witness on behalf of the state, and having attended the deceased at the time she was suffering, and to describe her condition, and to tell how she was suffering, etc. The defendant was charged with having killed the deceased by administering poison to her, and the nature and character of her suffering and the manner of

her death was material, and any evidence shedding light upon these matters was relevant. So, too, was it entirely competent to show by this witness that an autopsy was performed and that a portion of the deceased stomach was taken out and sealed up in a jar and sent to the state chemist. This evidence was admissible.

There was evidence that the defendant gave to the deceased a headache powder and then left her and went to his store and in a short while after she had taken the powder—about twenty minutes—she was found to be in apparent pain and suffering. The witness Kinsey was permitted to testify against the defendant's objection that at this time the deceased said: "I took that medicine that Walter (meaning the defendant) gave me and it is killing me. Run for the doctor. This evidence was not admissible as a dying declaration for it is clearly wanting in the proper predicate for the admission of such evidence. We are inclined to the opinion that the taking of the medicine, the immediate effects, and quick results constituted one continuous act and a declaration or statement such as the one made, and at the time made, was admissible as resgestae.

Dr. R. was introduced as a witness and stated the extent of his experience, with poisons. His evidence as to receiving the jar containing the stomach which he analyzed, was to the indentification of the jar as the one sent him by Dr. L. and was properly admitted.

EXPERT TESTIMONY OF PHYSICIAN.

(Kavanagh vs. N. Y. Transp. Co. 95 N. Y. S. 567.)

The plaintiff was injured in a collision with an automobile driven by the employee of the defendant. It appears that some twelve years before the accident the plaintiff had had rheumatism and had suffered from it off and on thereafter. It also appears that while the plaintiff did not receive serious injuries at the time of the collision, he was compelled to receive constant treatment for rheumatism. The following questions were asked the doctor as an expert witness: "As a matter of fact, if a man had had rheumatism before and received an injury to a particular portion of his body, would it not be likely to localize his trouble in that particular portion of his body?" Assuming that Kavanagh had had some years before, as the proof shows, rheumatism, and he received this injury to his side, would the fact that he had had rheumatism before be likely to localize the trouble in that region?

The court held that the question was not admissible. The defendant was not responsible for consequences which would be "likely" to flow from his servant's negligence, but from those which did flow from it. It would have been proper enough for the doctor to have testified, if he could have done so, that in his opinion the rheumatism for which he treated plaintiff resulted from the injuries received in the

accident, but he did not express such opinion and was not asked to. Testimony as to what was likely to result from the given state of affairs, without any proof at all that it did result, was incompetent and calculated to mislead the jury, and the amount of the verdict suggests that they may have been misled in this case.

A JUDGE WHO HAS MUCH COMMON SENSE.

Recently in the State of Washington a judge refused to permit a man to offer a radiograph in his court, for the purpose of attempting to show that a young lady whom the defendant had jilted, had tuberculosis. The defendant claimed that a radiograph would show conclusively whether or not the young lady had tuberculosis. She had refused to submit to the x-ray, resulting in the man refusing to marry her. She brought suit for breach of promise. The defendant put in the silly claim that "an x-ray photograph would show the diseased condition of the young lady's lungs." The judge had the good sense to refuse to permit any such absurd action and ruled that the case would have to be passed on by a jury.

This case shows to what unreasonable uses a good agent may be put. The public have come to believe that with an x-ray, we can see each separate organ and note the slightest variation from the normal. They do not know that all we can see are a lot of shadows and that these same shadows are difficult in many cases for an expert to interpret.

The writer once saw what purported to be an "x-ray picture" of a tuberculous lung. When it was produced, it turned out to be a pen and ink sketch, in different colored inks, of the patient's chest and the doctor's supposed location of the tuberculous lesions in the lungs. It is to be hoped that such frauds may soon be rendered impossible by the public becoming too intelligent to be imposed upon in such a manner. —E. H. S.—Cal. Med. Jour.

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FEBRUARY 1906

MEDICO-LEGAL BULLETIN.

Vol. 4 No. 5

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PUBLISHED BY
PHYSICIANS DEFENSE CO.
FORT WAYNE, IND.

We wish to thank our contract holders, who, by their co-operation and patronage, have made it possible for us to present the magnificent record shown on opposite page. Allow us to repeat our contention made six or seven years ago when we originated the protection of the medical practitioner: "Our plan is built on *principle*; it is for the reputable practitioner; it will eliminate blackmail."

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Medico-Legal Bulletin.

MEDICAL EVIDENCE—AN ADDRESS DELIVERED BEFORE THE SOCIETY OF MEDICAL JURISPRUDENCE.

By Dr. R. L. Pritchard, of the New York Bar.

Mr. President and Gentlemen:—The subject of the paper for your consideration this evening is "Medical Evidence." This is not a new question, as medical evidence is as old as medical jurisprudence. Medical jurisprudence is neither something in the science of medicine peculiar to law, nor is it anything in the rules of law peculiar to medical issues. The science of medicine does not change in a court of law from what it is in the sick room. Legal medicine only differs from therapeutic medicine in its practice. The practice of legal medicine or medical jurisprudence is effected by means of medical evidence, and this embraces the action of the professions of law and medicine. In no year since I have been connected with medicine and law has medical evidence escaped discussion, several times during each year, by one I have been impressed, as doubtless many of you have been, by the different ideas regarding it prevailing in the two professions. The lawyer looks upon medical evidence as a very unsatisfactory kind of testimony, as the evidence of his medical witnesses is scarcely ever more positive than opposing testimony on the other side. To the legal profession it is a matter of doubt whether these differences are the result of the uncertainty of medicine as a science, or the different refraction of the medical witness' mind when testifying for the plaintiff or the defendant. On the other hand, the medical profession admits the apparent inconsistencies of medical evidence, but attributes them to legal assumption in endeavoring to comprehend, harmonize and explain medical matters after a limited study of a particular case. It is my intention to consider this subject as both professions must meet it, from its inception in any case to the time it is given in court. And from this examination to discover, if possible, the starting point of diverging medical opinions, with the hope that with a little mutual adjustment in the practice of both when applied to medical evidence, medical opinions may run more parallel.

Medical evidence constitutes an important part of all personal injury actions, both in criminal and civil practice. In criminal actions,

the guilt of the defendant cannot be established without medical evidence showing a connection between the means used by the defendant and the crime charged. In the large number of civil actions claiming damages for injury to the person, proof of the defendant's negligence must be followed by medical evidence showing that the injuries and disabilities are the result of that negligence. The criminal actions, in which this kind of evidence is given, attract public attention because the issues are those of human life, and because of the attention given to them by the public press. The civil actions, however, resulting from carelessness and negligence are those in which this class of evidence is more constantly and continuously before the courts. In New York and Kings Counties negligence actions constitute about 40 per cent. of all actions on the Supreme Court calendar. If to these negligent actions be added actions arising from life and health insurance, and from mental capacity in the management of one's estate, as well as the ability to dispose of an estate by will, it will be seen that medical evidence may be required in about one-half of civil law practice. In and about the Supreme Court, during any trial day, there can be found fully half as many doctors testifying as there are lawyers trying cases. The medical evidence necessarily used by the prosecution or plaintiff must be open to contradiction and denial on the part of the defendant by the same kind of evidence. The opposing medical witnesses often force the issues in the case to appear secondary to their expert opinions. And to maintain and defend their opinions, these witnesses are apt to mistake a court of justice for the meeting of a medical society. Though these witnesses are trained in and are testifying upon the same science, their opinions so far favor the side calling them to testify that their evidence is often reproached with being the testimony of interested advocates, instead of being the opinions of disinterested men of science. In a late case of public notoriety one medical witness gave it as his opinion that his patient had died from diphtheria, while other medical witnesses gave their expert opinion that this man's death was the result of mercurial poisoning. It would be an injustice to opposing medical witnesses to say that they are not honest and conscientious in their opinions. And, notwithstanding their differences, they would repudiate the charge that the science of medicine is responsible for their contradictions.

The practice of medical jurisprudence is regarded as the art of framing hypothetical questions. These questions are the result of the combined effort of counsel and his expert. The great aim of the hypothetical question is to embrace only such facts as will enable the expert (who has often made the question) to give answers favorable to the side which has retained him. Both sides of the case take advantage of this favorite method of getting favorable opinions. If lawyers permit favorable opinion on a selection of facts, it is no part of the witness'

duty to call for facts of the other side. And the jury cannot be expected to undertake the counsel's duty, of weighing and adjusting opposing expert opinions, in accordance with all the facts in the case. The opinions of both sides are often disregarded; and both the legal and medical professions have become desirous of some change in the submission of medical testimony.

The change most favorably considered by both professions is one creating a board of experts, and that from among the members of this board the expert witness is to be agreed upon by the parties, or he is to be appointed by the court where there is no agreement. The object of this change is to make these witnesses independent of their retainer; but, unfortunately this change creates greater evils than the one it is intended to cure. This method of procuring experts would limit litigants in their selection of witnesses. And if the expert witnesses were appointed by the court, the unsuccessful party would feel aggrieved that an expert, in whose ability or knowledge of the merits of his case he had no confidence, had decided the extent of his injuries. On all medical questions these expert witnesses would take the place of the court and jury, and from their opinions there could be no appeal. It would be difficult to persuade a poor and unsuccessful plaintiff, in a negligent action, that he had a fair chance of proving his injuries against the rich and successful defendant. This complaint would be unjust, but our courts should not be exposed to any more grumbling of unsuccessful litigants than is absolutely necessary. The present system of submitting medical expert testimony is defective, but the defects are not the result of the medical witnesses being either deficient in knowledge or in honesty. Every medical practitioner, who has been permitted by the State to attend the injured man when his life and future usefulness were at stake, should certainly be competent to testify where the question is only one of compensatory damages.

A change in the practice of submitting medical evidence is greatly desired, but not one which would interfere with the litigant in proving his case as best he can. The change should be based on a study of the details of the existing practice, for the purpose of ascertaining what is defective in it, and if this defect can be remedied without a change in the principle of submitting evidence. As negligent actions constitute the greatest field for medical evidence, the practice in this class of cases can be taken as typical.

The value of expert evidence depends on three factors: the ability of the expert witness; the ability of counsel, whose witness he is, in getting from the witness intelligent and convincing expert opinions; and the cross-examination of the witness by opposing counsel. Counsel on both sides have to decide upon the medical evidence to maintain their case, and to cross-examine the medical witnesses of the other side. Plaintiff's counsel possesses some advantage in being able to learn all

about the plaintiff's injuries from the doctor who had attended the plaintiff, but this advantage is often more apparent than real. When counsel for the plaintiff finds it necessary to see the doctor about his client's injuries, the doctor is not free to give counsel a judicial statement of the facts. At the commencement of his attendance, and whilst the plaintiff was still suffering from the disturbance of sudden injury, the doctor had to give his opinion of the injuries and their outcome to his patient and the patient's family. And this, when for some time after an accident, it is not possible to limit the extent of injury and foretell all possible complications. It is prudence, as well for the patient's recovery as for the doctor's reputation, that the doctor's opinion should cover possible developments and complications. And having previously expressed his opinion of the plaintiff's injuries, the doctor gives counsel's statement of the injuries as they impressed him at the outset, instead of their subsequent course. Were the doctor to review his opinion, his care and caution at the time of his attendance would be attributed to unworthy purposes. The doctor's knowledge of the plaintiff's injuries makes him the medical witness for the plaintiff, which, combined with his friendliness to his patient and his bill for his services being still unpaid, constitutes him the adviser to counsel for the necessary medical evidence to prove the plaintiff's case. As a witness, his evidence in direct examination is favorable to the plaintiff and satisfactory to plaintiff's counsel. But the cross-examination shows that many of his opinions are unsupported by facts, which a jury can understand and appreciate. The cross-examination may not succeed in making this medical witness change his opinion; but instead of facts, he is compelled to rely on medical theories and his conclusions to sustain his opinion. Plaintiff's counsel learns from the cross-examination that his medical evidence is open to doubt; and, with his adviser in the witness chair during the cross-examination, counsel cannot be prompted with other facts in the case, which would remove the doubts raised by the cross-examination. The medical evidence for the plaintiff often fails because it had attempted to prove too much.

The defendant's medical evidence often fails from the opposite reason, in that it attempts too little. The defense has to cross-examine the plaintiff's medical witnesses before submitting its own medical evidence. Counsel occasionally waives cross-examination which is unfair to the jury, as it is expecting too much of them that they should find weaknesses in medical evidence when counsel was unwilling to undertake it. The jury is apt to infer that the medical evidence was too strong to be influenced by assaults of opposing counsel. And to counsel, cross-examination on medical subjects is no holiday task. Counsel's studies of the plaintiff's injuries in medical text-books and in consultation with experts is not sufficient. The cross-examined medical witness has the whole field of medical science to fall back upon for reasons to

support his opinions. Instead of leading the witness, counsel is led into the deeper waters of medical science, where his limited studies render it unsafe for him to venture in. Counsel seldom undertakes it without having an expert at his side to suggest questions for cross-examination. Medically this expedient is expecting too much from the expert, because, however great his learning may be, at the trial he has neither the time nor the facts to enable him to see through any fallacies in the testimony of the adverse medical witness. Legally, it is expecting almost the impossible from a medical expert that, without experience and practice as a cross-examiner, he should, through the tongue of another, be competent to direct a successful cross-examination. The questions suggested by him are intended to show that the witness had omitted to take into consideration everything known to the profession on the question at issue, or that the witness may have fallen into one of the possible errors of differential diagnosis. There is always one or more among the twelve jurors who knows that in medicine, no more than in other sciences, it is not possible to take into consideration everything before forming an opinion. The mere possibility ofe rror is more than overcome by the qualifications of the witness and the deliberation with which he has formed his opinion. The suggestion of error has the opposite effect upon the witness, in that it makes his answers more positive. After a number of useless efforts in endeavoring to get the witness to make admissions favorable to the other side, the medical adviser abandons his role of cross-examiner for the more congenial task of testifying on the defendant's behalf. As a witness for the defense, based on the absence of some, or the importance he attaches to other symptoms, he gives his opinion that the plaintiff did not suffer from the injuries, nor will the plaintiff suffer from the disabilities set out in his complaint. The defendant's difficulties at cross-examination are shifted to the plaintiff, with no greater success. The defendant may succeed in throwing some doubt on the nature of the plaintiff's injuries, but not that the plaintiff has received no injuries.

he following three cases, taken from one volume of our reports, will serve to show the kind of medical opinions given in courts and their influence on verdicts:

McTague v. Dowst, 51 Appellate Division 206, was an action of damages for personal injuries. The plaintiff was a child of five years old, and her evidence was that she was trampled upon by the defendant's horse, and that the forewheel of the defendant's truck ran up on her body, inflicting very severe injuries. The defendant's evidence was that the child backed into the horse and that the wheel did not touch her. The jury found in the plaintiff's favor and gave her the full amount sued for, $10.000. The Appellate Court refused to interfere with the jury's findings on the question of negligence and reviewed at a great length the medical evidence, with a unanimous affirmance of the

verdict. The medical evidence is cited from the Appellate opinion. The plaintiff's medical witness testified as follows: "He (medical witness) details her symptoms and conditions, laying considerable stress upon injuries to the bladder, resulting in chronic cystitis and a concussion of the spine. He did not testify that the cystitis would be permanent, but he did testify: Q. Can you say with reasonable certainty whether the spinal trouble is permanent or not? A. My idea is that it is, yes, sir. Q. What is the child suffering from at present? Well, at the present time there seems to be more weakness of the nervous system; the co-ordination of the muscles, they cannot seem to walk right, cannot make one leg go the way it wants to go; it will twist around, and my diagnosis was and is that it was an injury to these spinal muscles that interfered with the action of the muscles, the injury to the nerves." The learned judge, writing the unanimous opinion of the court, says: "If the defendant had deemed this statement incorrect, he could have easily contradicted it by his own physician." The defendant gave evidence by one physician, who had seen the child immediately after the accident, that there were no fractures or evidences of external injury, and at the time that this physician had made up his mind there was no trouble. At page 211 the defendant's expert, who had examined the child just before the trial, testified: "The inclination of the head and shuffling walk, when she does walk, and this retiring and crying are, largely subjective symptoms. Not altogether so, because they are designed at times. Sometimes she has it and sometimes she has not. I saw her in court this morning. She stood up as straight as you do, and I saw her on other occasions when she did not. Her position was there and the shuffling walk and the irritability and the nervousness and the crying—they were all there. I mean to say she is hysterical; it is a nervous disorder; it is not a disease. I don't mean to say that the child is simulating; she is suffering from those functional things we call nervous shock and hysteria and all that, and the base of it may be in the spinal cord, for all I know, and for all anybody else knows, but there is nothing there that anybody does know about. I will admit I do not; nobody else does." Notwithstanding the evidence of the defense that there were no external injuries at the time of the accident, and the expert evidence by the defense that the plaintiff's condition at the time of the trial was a functional nervous disorder, the verdict was for the full amount sued for. And it cannot be said the verdict was the result of sympathy, as it was concurred in by the learned judge before whom the case was tried and unanimously affirmed by the five judges on appeal.

The second case is McCready v. Staten Island Electric R. R. Co., 51 Appellate Division, 338. This was an action of damages on account of personal injuries received by the plaintiff whilst a passenger on defendant's car. There was a collision, and the plaintiff was thrown from

his seat upon his left side. The defense admitted its liability, and appealed from the verdict of $3,500 on the ground that it was excessive. The Appellate Court unanimously affirmed the verdict, and in its opinion reviewed the medical evidence. The plaintiff testified he was sixty-five years old, and that immediately after the accident he felt pain in his spine, back and side; that a month after the accident a hernia had had developed, and that his left leg is partially paralyzed. The plaintiff's physician testified: "He (plaintiff) suffers from impairment of heart, lungs, liver and blood vessels incident to old age. . . On the day after the accident he found only a bruise on the hips and a discoloration in the lumbar region near the spine. That the fall or blow was, in his opinion, the producing cause of his disease (the hernia." The defendant's medical witness testified that, "while a hernia might develop some time after a fall or a blow, yet an intense pain at the time of the trauma is a necessary symptom, admitting however, that it was possible that protrusion might not appear for some time after the blow or fall, that might have been the efficient cause thereof (the hernia)." At page 341 the plaintiff's physician testified: "He (the plaintiff) began to quiver, and the more I directed him to put his knees outward the more this quivering increased; that is a symptom of lack of spinal force. That is the mildest term I can give it, lack of reflex power of the leg. The common term used in medicine for that within the last twelve years, has been known as railroad spine." From the Appellate opinion, it does not appear that the defense offered any medical evidence on that lack of reflex power in the leg as a symptom of lack of spinal force. The jury must have taken the plaintiff's neurology at the latest science on nerve power and reflex action. The learned judge writing the unanimous opinion of the Appellate Court, says: "I find in the testimony (of the nervous system) a diagnosis of the disease of the leg as due to lack of spinal force." On the question of hernia appearing one month after the accident, the defendant's reliance on the absence of intense pain was not sufficient for the Appellate Court to say that this was a case where post hoc is not proper hoc.

The third case is Geoghegan v. The Third Avenue R. R. Co., 51 Appellate Division 369. This was an action for damages for personal injuries, in which the jury awarded the plaintiff $6,000. The Appellate Division granted a new trial on the ground that the plaintiff had not sufficiently pleaded his injuries to have had admitted his medical evidence at the trial. The Appellate decision was not unanimous, and one of the learned judges was in favor of affirming the verdict. The plaintiff's injuries were the result of the defendant's car striking the hind wheel of the wagon in which plaintiff was driving, and plaintiff was thrown on to the street. The dissenting opinion at page 372 cites the plaintiff's medical evidence in favor of affirming the $6,000 verdict. The plaintiff's doctor testified: "I found trouble with the eye sight;

twitching of the eyeballs; some symptoms of paralysis and some sensitiveness over different regions of the scalp; a tremulous tongue; disordered urinary apparatus, and difficulty in walking and reading. I think that is about all. Q. What test did you put him to to find these different things? A. I tested his sight. Q. With regard to the acuity of vision, what did you find in that respect? That is to say, was there any deficiency? A. I found his left eye was deficient two lines on the test card; I mean by that, that he could see a line of letters forty feet feet away which he should see at twenty feet away; with his left eye he saw a line of letters forty feet away which should be seen twenty feet away. With his right eye he saw the same line twenty feet, showing the difference between the two. Q. Would you say that the blow received on the 31st of March, 1897, would be a sufficient cause for the conditions that you have testified that you found the plaintiff in? A. I think that the blow furnished sufficient cause for the conditions stated. Q. How would you describe the condition you found the plaintiff in? What was he suffering from? A. He is suffering now from partial atrophy of the optic nerve; he is suffering also from a congestion of the covering of the brain called pachy-meningitis. Q. The trouble with the optic nerve, from what did that proceed? A. The trouble with the optic nerve proceeds, probably, from a slight effusion in the base of the brain following the injury. I should say that the trouble with the optic nerve came from effusion on the floor of the fourth ventricle, or in the base of the brain subsequent to the injury. What I have stated constitutes an injury to the brain. The optic nerve is the brain, is part of the brain. . . . The twitching of the eyeballs, the technical term of that is nystagmus. That interferes very materially with the patient's ability to read."

To the legal members of the Society comment upon the medical evidence in these three cases would be more opinion, and to the medical members comment is unnecessary.

The dissatisfaction resulting from the present practice is admitted by all, and a remedy must be sought in the causes leading to it. The reason for the defects in the plaintiff's medical evidence is his reliance for advice and testimony upon the attending physician. This physician is a necessary witness, but his proffered testimony requires to be examined alongside the clinical history of plaintiff's disability following the accident; not that he wishes to mislead, but because his opinions in the case were formed when he was not free from fears and anxieties as to his patient's condition. And when this examination calls for more medical knowledge than counsel possesses, it should be made by one medically competent, who has no opinions to maintain in that case, and who is not to testify. The duties of witness and medical adviser ought not to be expected from the same person, without subjecting one to the other. And when this is done, his duties as adviser before the

trial are controlled by the evidence he will give as a witness; and during the trial his evidence is controlled by the advice he gave before the trial. By eliciting from the plaintiff's medical witness only such opinions as are supported by facts observed by him, his evidence will not lose in cross-examination. These facts will further serve to cross-examine defendant's experts, should their expert opinions be contradictory of the plaintiff's evidence.

The defects of medical evidence on the part of the defense result from its experts too often testifying without a sufficient knowledge of the plaintiff's injuries. In many cases the defendant's experts learn, for the first time, at the trial what the plaintiff's injuries were. Without facts, or with such facts as the plaintiff supplies, their testimony cannot be positive and affirmative as to the plaintiff's condition. Much of their strength as experts is due to the fact that the medical opinions of the plaintiff's case were prematurely formed. They can only take advantage of doubts in the diagnosis made by the plaintiff's medical witness, and question the latter's conclusions. To the jury it is, however, evident that the defendant's experts have never seen the plaintiff; and if the plaintiff has been seen by them, it was at the defendant's request for the purpose of testifying. The skepticism and doubt of these experts are what the jury expect, especially if during the trial they have shown an interest in the case by repeated consultations and suggestions to the defendant's counsel. Their opinions on the medical case, after they have shown the jury an eagerness to assist counsel when cross-examining a professional brother, have as much weight as if counsel would take the witness chair and testify upon the law of the case.

What the defense requires is to know before the trial as much of the plaintiff's injuries as the plaintiff intends to prove them. The complaint in the action should be examined medically with as much care for the facts bearing upon the plaintiff's injuries, as it is examined legally for the facts relied upon by the plaintiff to prove the defendant's negligence. When the complaint is too general as to the injuries, the defendant should demand a bill of particulars. And whenever necessary, the plaintiff should be examined before the trial. The examination of the complaint or plaintiff should be made with the object of finding whether there is a connection between the accident and the alleged injuries, and between the injuries and the alleged disabilities. The examination of the plaintiff, at the trial, and even more so when he is examined before the trial, should be medical as well as legal. Medically, the cross-examination of the plaintiff is more important to the defense than is the cross-examination of the plaintiff's medical witnesses. The plaintiff cannot be examined for medical opinions, but he can be interrogated for signs and evidences of his alleged injuries and disabilities. Upon the plaintiff's admission that he had suffered from some symptoms and absence of others, the defense should base its cross-

examination of the plaintiff's medical witness, and have its experts base their opinions. An examination of the plaintiff at a reasonable time after the accident, in a case warranting such an examination, would preclude the plaintiff from subsequently claiming that every ill, to which his human flesh is heir, has been caused by the defendant's negligence.

The practice is further unsatisfactory because both sides frequently obtain opinions on a different state of facts. Where counsel on one side is permitted to swerve the slightest in stating the facts, expert opinions must differ more or less. In expert evidence, the diverging opinions are often pronounced, while the difference in the statement of the facts is hardly noticeable, except to the expert witness. The rules of evidence may sometimes permit opinions to be asked on the facts as one side of the case has them. But opinions obtained in this manner can be made injurious to the side procuring them, if counsel in cross-examination will repeat the question with the material facts, inserted as they have been proved. It will then be apparent to the jury that the material facts were purposely omitted. The opposing expert will be compelled to change his opinion, or he will qualify his opinion to an extent which amounts to an apology. The qualifications of an expert's answer is oftentimes the very best answer for the cross-examiner. Counsel's questions are as important as the expert's answers.

The existing practice of medical evidence can be submitted to the courts, with the number and extent of opposing opinions not greater than the reversals and dissenting opinions of the Appellate Courts. And where expert opinions would differ, an intelligent jury would have no difficulty in finding where the weight of opinion preponderates, as juries have always to do wherever there is a conflict of evidence. The value of medical evidence, where it is submitted on facts such as a lay jury can understand and appreciate, is greater than that of other oral evidence. Medical evidence is not the testimony given by the senses, which are greatly liable to error; but it is the testimony of scientific reason which, when made clear, carries conviction.—AMERICAN LAWYER.

PARTNERSHIP.

Partnership—What Constitutes Inter Sese and as to Third Persons.—In the case of Jones et al. v. Purnell, tried in the Superior Court of Delaware on October 9th, 1905, and reported in advance sheets, 62 Atlantic Reporter, page 149, et seq., the instructions of the Court to the jury state so very accurately and tersely the situation which constitutes a partnership that we reproduce it verbatim. This shows the relation between the members, and that though a partnership might not exist between them, it might be held to exist as to third persons:

What constitutes a partnership—that is, the legal elements of a partnership—is a question of law for the court. Whether in fact a partnership existed between the parties is a question of fact for you. We will say to you, as a matter of law, that wherever two or more persons engage in a legal business or occupation, under an agreement, either express or implied, to share the profits and the losses, that is what is ordinarily and broadly denominated a partnership. In Plunkett v. Dillon, 4 Houst. 396, we find it expressed in this language: "A partnership can be formed only, however, by a voluntary agreement, either express or implied, by two or more competent persons joining together their property, their labor, their skill and experience with one or more of them, in the transaction of business for their joint benefit and profit. It may be for a specific purpose, or confined even to a particluar transaction. When the question of its existence arises between the alleged partners themselves, there must be a common interest and risk in it, and an agreement between them, either express or implied, reciprocally to participate in the losses as well as in the profits of the business." And it has been said in one of the judicial decisions of this state on this subject that it is this community of interest in sharing the profits and losses of the business which constitutes a complete partnership, as well between the parties themselves as in respect to strangers who deal with them as partners.

In order to answer this question in the affirmative, you must be satisfied from the preponderance of the evidence that these three persons did enter into a partnership, under the name of Fooks, Purnell & Robinson, to buy and sell peaches and other fruit and produce at the railroad station at Georgetown, in Georgetown hundred, Sussex County, and State of Delaware, and any point or points at which they might conclude to operate for and during the fruit season of the year 1905. A partnership may be proved between the parties, as well as with others, by evidence of the acts, dealings, conduct, admissions, and declarations of the parties themselves, as well as by direct proof in different lines. As between the parties, you must be satisfied by a preponderance of the proof of this fact, that a partnership actually did exist, and it differs where the parties contesting are partners, and where a third party is suing; for in the latter case, although the parties may not in fact be partners, yet they may so conduct themselves towards the third party as to make themselves liable. But between partners themselves, in order to establish a liability from one to the other, there must be an actual partnership proved, either directly or indirectly, by a preponderance of proof. So that, after considering all the evidence that you have had produced before you in this case, it is for you to say, in answer to that first question, either that there was or was not such a partnership."—THE LAW.

Medico-Legal Bulletin.

PUBLISHED MONTHLY BY THE
PHYSICIANS DEFENSE COMPANY
Fort Wayne, Indiana

VOL 4 FEBRUARY 1906 NO. 5

THE MEDICO-LEGAL BULLETIN is issued on the first of each month, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request

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RELATIVE TO MALPRACTICE.

A prominent lawyer of Philadelphia, in a recent letter, speaks as follows of the situtaion: "From what I can observe there is a decided tendency at present to make these attacks upon physicians and I believe it is of the highest importance to the profession to make a vigorous resistance, now that the new 'industry' is in its infancy. The time was when the trial lists were made up of cases arising from the ordinary channels of trade. During the last ten years, however, the character of business has entirely changed and damage suits are substituted. The courts have now made it so difficult to recover in traction or railroad cases, that there is a serious danger that the medical profession will be the next subject of attack. The field is a new one and for a time it is reasonable to believe that the results will be disastrous just as they were to the traction companies when they were first attacked."

A PROMINENT PRACTITIONER SAYS:

Carry a policy in the Physicians Defense Company and fight your case to a finish. One of the principal reasons why many of these actions are brought is the hope that the surgeon, rather than be worried by a long drawn out suit and the uncertainty regarding the outcome before

the average jury, will settle the case and be blackmailed. This encourages others to start suits, and he who fails to stand up and fight his case through is doing an injury to the whole profession. Nothing discourages attempts of this kind so much as to hand the matter over to a defense company that will call the bluff and stop the suit.

LEGAL BEARING OF THE FEE BILL.

The following query is addressed to this department:

"What effect will a fee-bill, adopted by an association of physicians and establishing the minimum regular charges of members of the association, have upon a physician (a member of the association) who is a specialist, in the collection of a large fee in a particular case?"

If a fee-bill of charges has been established by an association of physicians recognized by law, such as a county medical society or a state medical society, incorporated pursuant to statute, such fee-bill can, if properly authenticated as having been adopted by the association, be offered in evidence on behalf of the patient and against the physician. Such evidence, however, would not be conclusive upon the right of a specialist to charge a larger fee than that established by the fee-bill. The fee-bill is evidence of what an association of physicians themselves would regard as a reasonable charge under given circumstances, which evidence might be overcome by evidence showing that a higher charge under different circumstances was not unreasonable.

In the absence of a special contract, the law assumes that a patient will pay the physician what his services are reasonably worth. In estimating the value of the physician's services a court or jury should consider the professional skill and experience of the physician, the nature and character of the services rendered, the difficulties and the nature of the case, and the amount of services rendered.

Therefore, applying the above rules to the query above propounded, it follows that a fee-bill cannot be made conclusive evidence against a physician who is a specialist, such specialist having the right to charge for the special character of his qualifications in connection with the service rendered.—COLORADO MED. JOUR.

Judicial Decisions.

Under this heading will be presented each month information relative to judicial decisions affecting the medical profession.

DEATON VS. LAWSON, 82 PAC. 879 (WASH) NOV. 14, 1905.

On the 18th day of March, 1903, the plaintiff and the defendant O. V. Lawson entered into the following written contract: "This contract and agreement, entered into this 18th day of March, 1903, by and between the officers of the State Medical Institute and the physician in charge, located at Seattle, State of Washington, the party of the first part, and C. C. Deaton, of Seattle, Washington, the party of the second part, witnesseth: That the party of the first part agrees and contracts to render professional services to the party of the second part until the party of the second part shall be cured of a certain disease, concerning which the party of the second part has this day consulted the party of the first part. The party of the second part, for and in consideration of the above agreement, does hereby agree and contract to pay the party of the first part the sum of.....Dollars ($469.00), as follows, viz: By cash, $469.00. It is also agreed that the party of the second part follow directions carefully, and to take the medicines and remedies as prescribed from time to time by the parties of the first part, until a complete cure is effected. In witness whereof, the respective parties have hereunto set their hands and seals this 18th day of March, 1903. C. C. Deaton, S. M. Inst." The circumstances leading up to the execution of this contract, as detailed by the plaintiff, are these: The plaintiff, at the time, was suffering from indigestion and other ills, and called at the office of the State Medical Institute for treatment. He there consulted with the defendant Lawson and with Dr. Richards, a physician in the employ of the defendant, and they guaranteed to cure him within three months, for the sum of $85. When the plaintiff came to pay the defendant Lawson, he exhibited a considerable sum of money in addition to the $85. On sight of such additional sum, the defendant Lawson forthwith represented to the plaintiff that he could give a different treatment which would effect a permanent cure within six weeks, but that it would cost more. The above contract is the result. The plaintiff received some medicine on the day of the execution of the contract, and returned on the following day for further treatment, as directed.

The court found that the defendant Lawson was not entitled to practice medicine under the laws of the state of Washington, not having a license to so practice, as provided by the statutes of said State; that the State Medical Medical Institute has in its employ one Dr. Richards, a regularly licensed physician; that the said Lawson fixed the fees and charges against the plaintiff, collected the same, and signed the written contract upon the part of the State Medical Institute, and that Dr. Richards had nothing whatever to do with fixing the fees or charges or in making the contract with the plaintiff.

The findings of the court and the entire testimony clearly show that this was the personal contract of O. V. Lawson. The reference in the body of the contract to the State Medical Institute, its officers, and the physician in charge, and the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, are but so many pretenses to evade the laws of the State. It is admitted in the pleadings that the State Medical Institute is owned, operated, managed and controlled by Lawson, in other words, he is doing business under that name. It is further shown that Dr. Richards was not a party to the contract and was in no manner obligated to perform it. The court finds, and he himself testifies, that he has no connection directly or indirectly with the State Medical Institute, has nothing to do with the making of contracts or fixing of fees, but is simply employed on a salary. If we should sustain the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, we have no contract at all, as the record clearly shows that he had no authority in that behalf. Stripped of all subterfuges and pretenses, this is neither more or less than a contract on the part of the appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void. A contract to render professional services is personal and nonassignable. No person can perform or tender performance except the person therein named, without the consent of the other party to the contract. Inasmuch as the appellant Lawson could not perform his part of the agreement without violating the laws of the state, there was no consideration for the alleged contract or the payment of the money thereunder, and the respondent is entitled to recover the money so paid, so long as the contract remains executory. The fact that he was not awarded as much as he was entitled to under the law is no ground for reversal.

There is no error in the record and the judgment is affirmed.

LEWIS VS. JOHN CRANE & SONS 62 ALA. 60 (VT.) NOV. 21, 1905.

This was an action on the case in which the plaintiff sought to recover for injuries alleged to have been sustained through the negli-

gence of the defendants. The cause was tried by the jury of the June term, 1901, of the Caledonia county court.

The plaintiff's declaration alleged injuries to his legs, back, and body resulting in inability to labor. Physicians called by the plaintiff testified, under the defendant's objection and exception, to the condition of the plaintiff's ankle at the time of the trial, as to the amount of stiffness that remained, and, as experts, as to what effect the existing stiffness would have on the ability of the plaintiff to get about and work. The objection made to their testimony as to the condition of the plaintiff's ankle was solely that it was not admissible under the declaration. But the alleged injuries made this testimony admissible. It was not necessary to the admission of this evidence that the parts claimed to be injured should be described with anatomical nicety. The testimony as to the condition of the ankle at the time of the trial is presumed to have been connected with testimony as to the claimed injuries, since the bill of exceptions discloses nothing to the contrary, and since the objection was as is above stated. The objection to the testimony of the doctors as to what effect the existing stiffness would have on plaintiff's ability to get around and work was that the subject-matter was not proper for expert evidence. But it would require an expert to tell the nature of the stiffness, the motions and actions that it would impede, if it would impede any, and the expert evidence was properly received. Whether such stiffness as was found resulted from muscular inflammation, from an injured tendon, from an impairment of the nerves of motion, or from voluntary control thereof by the plaintiff or from some other cause, whether the rigidity was likely to be relieved or to be aggravated by exercise, whether it was temporary or permanent in its nature, were all matters upon which the opinions of experts could properly be taken. What the expert testimony in fact tended to show does not appear from the bill of exceptions.

STATE BOARD VS. TERRY 62 ALA. 193 (N. J.) NOV 13, 1905.

This is an action to recover a penalty for practicing dentistry without a license. The statute (P. L. 1898, 119) subjects to the penalty any person practicing dentistry not being at the time legally licensed to practice as such in this state (Section 12) and gives a right of action to recover the penalty to the State Board of Registration (Section 16). The act is not to be construed to prohibit the registered student of a licensed dentist from assisting his preceptor in dental operations while in his presence and under his direct and immediate personal supervision. (Section 8). The only provision for registration is that there shall be an annual registration for every person practicing dentistry within the state, together with an annual registration of each and every assistant in the employ of every such person. (Section 10).

In the present case the judge left two questions to the jury: (1) Whether the defendant was practicing dentistry; (2) whether he was a regularly licensed dentist. He charged that, if the jury found that the defendant while practicing was doing so as a student of a regularly licensed dentist, the verdict should be for the defendant. To this part of the charge exception was duly taken. We think the charge erroneous. The exception in Section 6 is not an exception of all students in all circumstances. It is narrowed to a registered student while assisting his preceptor in the preceptor's presence, and under his direct and immediate personal supervision. It is difficult to determine what the act means by a registered student, since no provision is made for the registration of students as such, but only for the registration of assistants. In the present case that question need not be decided. There was evidence indicating that the defendant was not an assistant, but rather the principle, and that the dental operations he performed were performed independently and on his own responsibility, and not under the direct and immediate personal supervision of the alleged precep-tors. The defendant did not bring himself within the exception of section 8 merely by proving that he was a student without proving the other qualifications in that section.

For this error, the judgment must be reversed, and there must be a new trial.

CHICAGO CITY RY. CO. VS. LOWITZ, 75 N. E. 755 (ILL.) OCT. 24, 1905.

Appellant complains that Dr. Ferguson, a witness for appellee, was permitted to state that, in an examination of appellee made by him the day he testified, he "found deformity," and abnormal mobility of the hip, an apparent inability to use it; the objection being to the last clause of the answer. The witness, before this evidence was given, had testified to the same thing without objection. Subsequently he testified without objection as follows: "I have seen a limb with the fracture of the neck of the femur where there was nonunion, where they were able to use it fairly well, and I have seen others where they could not use it at all. How it is in this case we will have to testify to. I do not know that. I could only form my opinion on that. My examination would not reveal that." It is clear from this evidence that Dr. Ferguson was giving his opinion in the expression which was objected to. He expressly disclaims any knowledge of the fact, and says that his examination would not reveal the fact one way or the other. He was competent to give his opinion as an expert. The court did not err in allowing the testimony to stand.

HUNTER VS. VILLAGE OF ITHICA 105 N. W. 9 (MICH.) OCT. 31, 1905.

The plaintiff sued for damages sustained by her husband which are claimed to have caused his death.

Error is assigned upon a ruling admitting a question to Dr. Porter, stating hypothetically the circumstances of the injury to the deceased, and asking whether an injury such as the witness discovered, produced in this manner, could cause an injury to the medulla. This question was objected to on two grounds, first, because it did not call for a statement that such an injury would be likely to cause such results; and, second, because it permitted the doctor to use knowledge of the patient's condition not embodied in the question. The first objection went rather to the weight of the testimony than its admissibility. The latter would, under Fuller vs. City of Jackson, 92 Mich. 201, 52 N. W. 1075, be entitled to weight, were we not satisfied that the opinion of the doctor was based upon conditions discovered by him and previously fully detailed to the jury.

We think there was a case for the jury.

Judgment affirmed.

ST. LOUIS S. W. RY. CO. VS. DEMSEY, 89 S. W. 787 (TEX.) OCT. 28, 1905.

J. H. Demsey brought this suit to recover of appellant damages alleged to have been sustained by him on account of the wreck of a hand car on which he was riding, while engaged in the employ of the defendant as a section hand.

Appellant's second assignment of error complains of the admission, over its objections, of the testimony of Dr. J. M. Wolfe that the plaintiff told him, he (plaintiff) could not hear a watch tick when the same was held more than five or six inches from his ear. The objections urged to this testimony were and are that the same was hearsay and self-serving. The proposition propounded under this assignment is "that the mere declarations of the plaintiff (as detailed by the witness) made to an expert on an occasion prepared by himself for the sole purpose of furnishing the expert with information on which to base an opinion favorable to plaintiff, was not admissible." The proposition is a correct statement of the law (Railway Co. vs. Johnson, 95 Tex. 409, 67 S. W. 768) but the bill of exceptions reserved to the ruling of the court does not show that the declarations complained of were made on such an occasion and for the purpose suggested by the proposition, and an adverse ruling to appellant's contention is not presented for review. The bill is sufficient, perhaps, to show, and the proposition admits, that the witness was an expert. As such his statement of the declaration complained of was admissible, unless made on an occasion, and for the purpose indicated in the proposition. The bill does not show that

they were so made, and hence it does not appear that the ruling of the court below involved the question of law contained in the proposition. It may be true, as shown by the statement contained in appellant's brief under this assignment, that the witness testified on cross-examination that his examination of plaintiff was made with the view of testifying on this trial, etc., but this court is not required to look to the evidence contained in the statement of facts in aid of a bill of exceptions. As the case will be reversed on other grounds, it is proper to say that, if upon another trial it should be made to appear that the witness, Dr. Wolfe, tested plaintiff's hearing by holding his watch a certain distance from his ear and asking him if he heard the tick, and that the "occasion was prepared by the plaintiff for the sole purpose of furnishing said witness, as an expert, with information on which to base an opinion favorable to plaintiff," such testimony should be excluded. The second paragraph of the court's charge is so framed, doubtless through inadvertence, that we think it is probably subject to appellant's criticism; especially do we regard it as calculated to confuse and mislead the jury. This imperfection, however, is not likely to occur again.

DUTY TO DISTURB CONGREGATION.

The prosecution of a "strict member of the church and a man of most exemplary deportment" for disturbing the congregation while engaged in divine worship, by his singing, was the subject with which the court had to wrestle in the case of State v. Linkhaw, 69 N. C. 214. The report shows that the effect of the singing "was to make one part of the congregation laugh and the other mad; that the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." It was shown that the disturbance was so great that the preacher in one instance declined to sing the hymn announced, that the presiding elder had refused to preach in the church on account of such disturbance, and that, after a sermon of special solemnity, a leading member of the church had on one occasion gone to the defendant and specially requested him not to sing at that time, and in this instance he refrained. But that, although the church members and authorities had on many occasions expostulated with him, he persisted in singing, and declared that "he would worship his God, and that as a part of his worship it was his duty to sing." He was found guilty. But the case went to the supreme court of the state, where it was held that, as he had no intention or purpose to disturb the congregation, but was conscientiously taking part in the religous services, he was not guilty, notwithstanding the fact that a disturbance resulted. Thus, again, was religious freedom established.—CASE AND COMMENT.

THE MARRIAGE OF EPILEPTICS.

The question of allowing the marriage of epileptics is one that is demanding legislation. There should be definite legislation prohibiting such marriages. Connecticut was the first state to enact such a law which was done in 1895. Michigan, Minnesota, Kansas and Ohio have since enacted a similar law. The validity of the act was ruled upon by the Connecticut Supreme Court—Gould vs. Gould—and its constitutionality sustained. The Court says: The constitution of the State guarantees to its people equality under the law in the rights to "life, liberty and the pursuit of happiness." One of these is the right to contract marriage; but it is a right that can only be exercised under such reasonable conditions as the legislature may see fit to impose. It is not possessed by those below a certain age. It is denied to those who stand within certain degree of kinship." After arguing the case at considerable length the Court concludes: "It follows that the statute in question was not invalid, as respects marriages contracted by epileptics, after it took effect."—IOWA HEALTH BULLETIN.

LOSES SUIT AGAINST MOTHER.

Child Cannot Under Law Recover Damages for Injury by Parent.

(SPECIAL TO THE RECORD-HERALD.)

BLOOMINGTON, ILL., Jan. 20.—A child under no circumstances can recover damages from a parent for any injury inflicted upon it or for any cruel or vicious treatment to which it may have been subjected. This is the law in Illinois as construed by Judge Gest in the Rock Island Circuit Court and probably ends a remarkable suit that has been attracting much attention in central Illinois for the past year or more.

Leonora Skinner, aged 5, was the plaintiff, and brought suit against her mother, Mrs. Myra Smith, for $10,000 damages, through her best friend, Dr. E. M. Bradford. As the declaration recited, the child was deserted by the mother shortly after its birth and was taken to Freeport in a market basket in the dead of winter and left in the depot. The exposure made the child blind and it was injured otherwise. It was taken to a home for the friendless and is still a public charge.

The physician who attended the child, seeking to secure some fund by which the education and care of the charge could be promoted, filed the suit.

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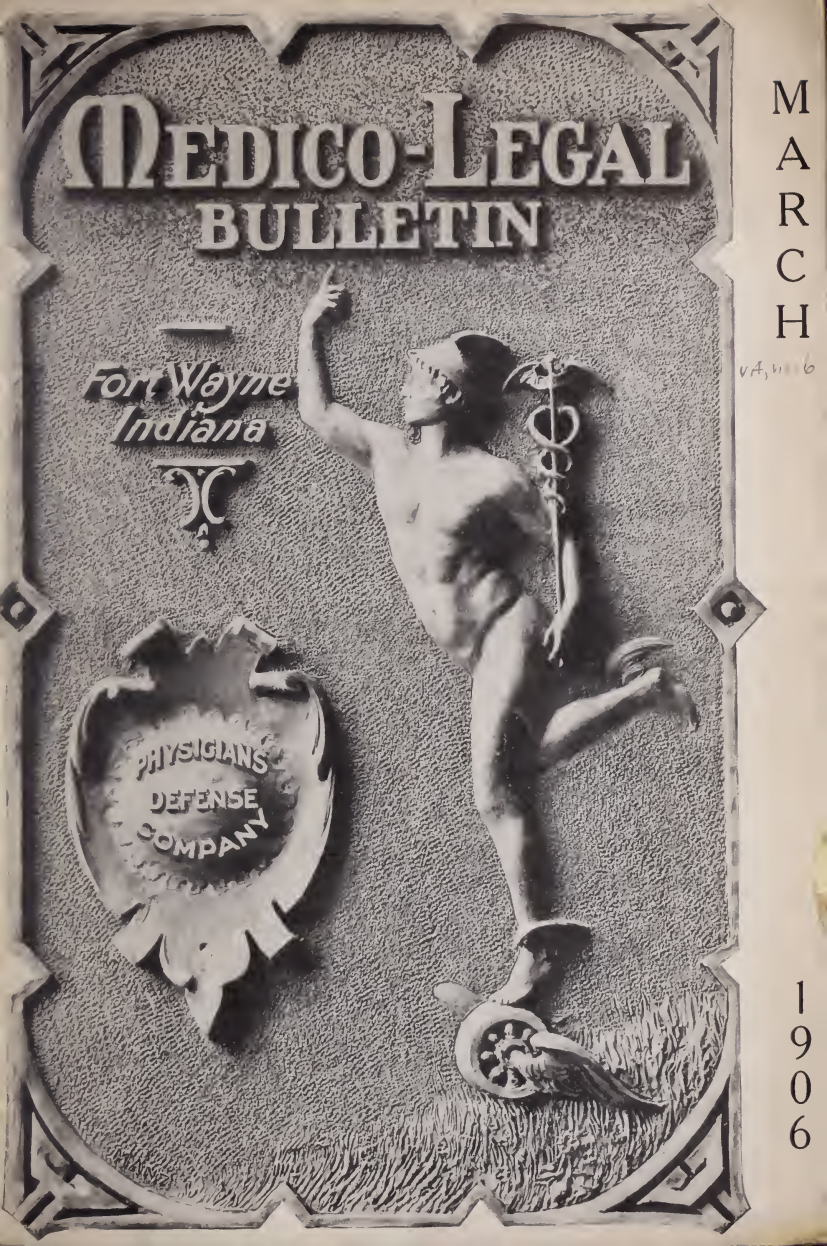
MEDICO-LEGAL BULLETIN

Fort Wayne Indiana



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$15.00 PHYSICIANS DEFENSE COMPANY $15.00

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For a Defense Contract for Medical and Surgical Services, and agree that said contract shall be based upon the following statement of facts and agreements:

My full name is.....Office No.....Street

City of.....County of.....State of.....

If connected with a firm, the style is.....

I graduated from the.....in the year.....

I practice under the.....School of Medicine; and have been duly Registered and Licensed to practice in this County, and under the laws of this State and am a member in good standing in the.....

.....

I agree that this Contract shall not cover suits for damages in which services were rendered while under the influence of liquor or drugs.

I agree to notify the Company at once by telegraph when demand is made or suit commenced for damages, and to immediately forward by mail any summons served, copy of the complaint filed, a history of the case and of the services rendered as per instructions from the Home Office, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance, not pecuniary, in defense of the case, without charge to the Company.

Date..... Applicant's Signature .....

CAPITAL STOCK $100,000 | NUMBER | INCORPORATED UNDER THE LAWS OF INDIANA

The Physicians Defense COMPANY

FORT WAYNE INDIANA

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In Consideration of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the _____ day of _____ of each year during the life of this contract,

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ of the City

of _____, County of _____, State of _____

against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Ind., of any suit brought or demand made and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages by civil suit as above, the company will employ a list of attorneys for whose services the holder hereof shall have a right, with, together with the company's attorneys, will defend the suit without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal and of every other legal proceedings shall have been exhausted, or until the sum of Five Thousand Dollars shall have been expended in said defense, provided said company shall not be under obligation to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the unexpired year term or any renewed one year term then in force.

Said company does not obligate itself to pay or to assume, or to secure the payment of any judgment rendered against the holder hereof, in any case defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the assured holder, compromise the same without the consent of the company in writing first thereto had, and by reimbursement of the company for expenses thereinbefore incurred.

No suit or claim will be defended by this company, under this contract, in which the cause of action arose previous to the date of this contract.

This contract does not cover criminal prosecution nor suits for assault, criminal abortion, bastardy, homicide or other criminal act, or actions arising by way of contract or agreement.

The company may cancel at any time the unexpired portion of this contract upon written notice mailed to the holder hereof, and the unearned portion of the consideration thereafter shall be returned to the holder hereof.

This contract does not take effect until the consideration therefor shall have actually been paid to the company or its authorized agent, but if the holder shall have paid such consideration and shall for any reason from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not lapse at the end of the year as stated above if the holder hereof shall pay the annual consideration in advance at the H. M. Office in Fort Wayne, Ind., or to an authorized agent of the company, to effect same but the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such consideration shall be paid, provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or any liability for same, can be waived or altered in any manner by any person, other than the president or secretary, in writing countersigned herein.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal affixed hereto in

Fort Wayne, Indiana, this _____ day

of _____ 19__.

FORM 1

Milus M. Foster
President.

C. H. Merritt
Secretary

MEDICO-LEGAL BULLETIN

Vol. 4 MARCH 1906 No. 6

Leading Original Articles

PRIVILEGED COMMUNICATIONS

The law of evidence consists of a compilation of rules directing what shall not be admitted as evidence in an inquiry held before a judicial tribunal. In their nature, these rules are negative rather than affirmative. It may be said that they prescribe what is not evidence rather than what is evidence. All material facts which would tend to prove or disprove a certain issue are, generally speaking, admissible except as barred by rules of evidence. No rule better illustrates the negative character of the law of evidence than that rule which forbids the introduction of privileged communications. By privileged communications is meant those facts which are material to the issue in the cause, but which cannot be admitted in the trial thereof, for the reason they were acquired by the person attempting to testify because of some confidential relation to the person who objects to their admission. The reason that excludes evidence of this character is based on public policy and public good.

Communications between attorney and client were, generally speaking, the only privilege recognized by common law. Statutes, however, have extended the scope of this privilege, and have made it applicable to communications between priest and penitent, communications between government and informer, communications between witness and jurors, and in some jurisdictions communications between husband and wife. In most jurisdictions in America, there are statutes making communications between physician and patient privileged, and excludes them as evidence upon the objection of the patient. Rhode Island and Texas are notable exceptions to this rule. In this article we will deal exclusively with the latter class. The privilege of these communications has been established and grown out of the same theory that exclude communications between attorney and client. The courts have considered that the public good demands that those afflicted with physical ailments should be guarded in every way possible in their consultations with physicians. To expose the private relations of a physician and his patient would be to deter those having need of medical counsel from seeking the aid and advise of the physician. When we consider, however, that the sole object of an inquiry before a legal tribunal is to develop and determine the truth or falsity of a certain proposition, it is somewhat hard to reconcile the rule that excludes evidence, because of the same being privileged, with the idea of such inquiry. In the majority of cases, the knowledge held by the physician on the stand is peculiar to him. No person can acquire it except himself and the patient. To exclude his statements would seem to close the doors to the opposing litigant so far as being able to ascertain the truth. It is safe to say that the vast majority of cases in which the

rule relative to privileged communications is invoked, are suits for personal injuries. It is well known that the chief element of damage in these cases, or at least one of the elements of damage usually pressed to the consideration of the jury, is some injury to the nervous system or some internal injury caused by schock, etc., which cannot be ascertained by any person other than a physician and cannot be ascertained to any degree of certainty by a physician except when acting in the capacity of an attending physician and treating the person whose injuries are in question for that or other ailments. Injuries can easily be, and often are, assumed and pretended, as well as bonafied injuries greatly aggravated by statements of pain and physical inabilities. The defendant in these suits appears to be entirely at the mercy of the plaintiff, and his retained expert. The means of inquiry are entirely closed to the defendant, and the jury are allowed to consider without any contradiction, the self serving declaration of the plaintiff. After observing the practical result of this rule of evidence as invoked in suits for personal injuries, one is constrained to feel that the object of the rule has gone amiss, and that it serves the ends of injustice rather than justice. The courts have recognized the dangers incident to this rule relative to privileged commnnications, and are inclined to construe it narrowly. Unless the evidence proposed falls clearly within the provisions of the statutes, the courts will not allow the rule to be invoked.

The first requisite that evidence must meet before it can be classed as a privileged communication is that it was a communication to a physician. It has been held, however, in McGillicuddy vs. Company, 55 N. Y. S. 259, that the physician to whom the communication was made need not be a registered physician. His license need not be registered as provided for by the statute. In this case the physician in question was properly qualified in every other respect. It has also been held in Colorado in the case of Lodge vs. Locher, 68 Pac. 136, that under the code providing that a physician or a surgeon duly authorized to practice his profession under the laws of this state shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, etc.; a physician practicing in another state, and not authorized to practice under the laws of this state, is not subject to the restriction. The second requisite that must be met in order to entitle the communication in question to be considered privileged, is that it was made by the patient to the physician for the purpose of enabling the physician to diagnose the ailment of the patient, or to enable him to treat and advise the patient relative to some physical ailment, disease or disability. That is, the relation of physician and patient must have existed before the privilege can be invoked. The burden of showing that the relation of physician and patient existed and that the communication was made during the time such relation existed, and for the purpose of enabling the physician to diagnose, treat and counsel the patient in his physical ailments, is upon the person claiming the privilege. When this fact is once established, the presumption that the relation of physician and patient exists, continues until there is some affirmative act or circumstance which would show the discontinuance of such relation. There are circumstances, however, which would make the physician the judge as to whether or not the relation of physician and patient existed, and whether or not the communication in

question was necessary for the physician to know in order to enable him to treat or diagnose the disease of his patient. In re Helsey estate, 9 N. Y. S. 441, it was held in proceedings to probate a will that evidence of a physician as to a statement to him by the disease, and to which the physician testified, was not necessary to enable him to act in his professional capacity, is admissible, notwithstanding the provisions of the code which forbid a physician to disclose information obtained while acting in a professional capacity. The rule generally followed, however, in this as in all other questions of evidence, is that the court must determine from an examination of the witness, or from facts disclosed by the testimony, whether or not the proposed communication would come under the provisions of the statute making it privileged. The circumstances which give rise to the ration of physician and patient are too many to enumerate, and each case must stand or fall on its own merits. The surroundings of the parties, their intentions, and the nature of the disease or ailment in question has much to do with determining whether or not a certain communication is privileged. In Patterson vs. Cole, 73 Pac. Rept. 54, it was held that a certain physician who was employed to attend a patient injured in an accident was, shortly after his employment, and preliminary examination, displaced by the family physician being called to take charge of the case, and that the physician who was originally called within a few hours after the family physician had arrived, had visited the patient but did not administer any treatment or make any further diagnosis, and who stated that he did not regard himself at such subsequent time as the attending physician, cannot testify to a statement which he overheard during such visits. In Brigham vs. Gott, 3 N. Y. S. 518, the mental condition of the decrease was in issue. Her physician testified that he made visits both professional and unprofessional, and that he had noticed a change in her memory about a year before her death, the change being that she did not recollect things as she formerly had done at the beginning of his treatment, at which time she always recollected the kinds of medicine she used. The court held that his testimony was incompetent, under the code prohibiting the physician disclosing information acquired in attending the patient. The theory of the decision being, that the information acquired, whether at the time the physician was making a friendly or professional visit, was due to the fact that he was the attending physician, and that the information learned at different times and under different circumstances could not be separated from that learned as a physician, and for that reason the whole of the information must be excluded. The rule has been extended so far as to exclude statements made by a third person when calling on a physician for the purpose of securing his attention for another. The case of People vs. Brower, 6 N. Y. S. 730, well illustrates this phase of the rule. In this case the defendant was indicted as for manslaughter, in aiding a woman to procure a miscarriage. The defendant entered the office of the physician and stated that the woman in question was very sick, and that he wished the physician would come at once. The physician stated to him that he would like to know what the difficulty was before leaving the office to attend the woman, as such knowledge would enable him to provide himself with proper remedies. The defendant informed the physician that the woman in question was about three months in pregnancy and that he had inserted a catheter

into her womb, and that the defendant blew into it. The defendant further stated that he did this because the same process has proven successful on a former occasion. It was sought to introduce the conversation as evidence against the defendant, and the court held that such statements as above recited were privileged under the code 834 which forbids a physician to disclose any information which he had acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity.

The same rule applies to those physicians who are called in for the purpose of consultation as applies to the regular attending physician. The counseling attending physician. The counseling physician cannot disclose anything learned, either from a patient directly, or from observations he may be able to make in the capacity of a consulting physician. In Reinham vs. Dennin, 9 N. E. 320, a physician who, at the request of the attending physician, called on the deceased for the purpose of consultation, was asked the following questions: "Will you describe the appearance and condition of the sick man when you got into the room? At the time you examined this man, was he, in your judgment, in that state known to your profession as collapse? State whether in your judgment, at any time after the occasion when you were there, he was in such a condition that he was capable of understanding and taking into account the nature and character of his relations by blood and marriage and those who were or might become recipients of his bounty and make an intelligent disposal of his property by will?" These questions were held incompetent, as they tended to disclose information acquired by the witness while he was acting in a professional capacity. There is an apparent line of exception to this rule which may place the counseling physician on the same basis as the attending physician. Cases, however, are so varied as to the circumstances surrounding them, that the exceptions could not be said to constitute a rule to the contrary. In Henry vs. Railway 10 N. Y. S. 159, it was heldthat where the attending physician of the plaintiff in an action for personal injuries requested the witness, who was a surgeon, to make an examination of the plaintiff two weeks after the accident from which the injuries were alleged to have occurred, that such witness is not disqualified from testifying against the plaintiff as to the existance of alleged injuries. It is suggested that this decision is based on the fact that it did not appear that the witness was requested to, or expected to treat or prescribe for the plaintiff, or that he did either. It appears, however, that it is not a requisite in order to establish the privilege that the physician in question be retained for the purpose of prescribing or treating the patient; for instance: it was held in Duggan vs. Phelps, 8 N. Y. S. 916, that a physician who was acting as an ambulance surgeon is barred from testifying as to the condition in which he found the patient when he first saw the patient. Likewise it has been held that a surgeon in a railroad hospital, to which an injured person is brought, is also barred from testifying as to what he saw or heard relative to the disease of the patient, or from testifying to any knowledge which he may have acquired while the patient was under his care, presumably for the purpose of being treated. Likewise the physician who has been called to treat a person who was injured in an accident cannot testify as to his conversation with the patient, relative to her injury, or disclose information acquired while making the examination.

In Raymond vs. Railroad Company, 21 N. W. 495, it was held that a physician could not state the answer of a person who was injured by the operation of a railroad train which answer was given in response to a question asked by the physician as to how the accident occurred.

A new phase of the question has arisen under circumstances in which a defendant in an action for personal injuries had sent a physician to examine the plaintiff as to his personal injuries. In this case, although the physician did not go to the plaintiff for the purpose of making an examination to aid him in treating or diagnosing the ailments of the patient, the courts held that the knowledge so acquired is barred under the statute of privilege. In Munz vs. Railroad Company, 70 Pac. 852, it was held that where a physician examines a person who has been injured in an accident, it will be held that such examination was made while the relation of physician and patient existed, and that the information so obtained was for the purpose of enabling him to prescribe for the patient and to treat his physical ailments. Likewise in Weits vs. Railroad Company, 53 Mo. App 39, it was held that information learned from an examination of the plaintiff by a physician sent by the defendant for that purpose is prohibited, unless it was expressly understood by the plaintiff that the examination was made in the interests of another person and not her own. It was held, however, in Heath vs. Railroad Company, 8 N. Y. S. 863, that in an action for personal injuries a physician who was in the defendant's employ, and who called upon the plaintiff for the sole purpose of procuring information for the benefit of the defendant relative to the injury and the circumstances of the accident, and who had given the plaintiff no reason to believe that he had intended to render her any professional services, may testify over the objection of the plaintiff that the information would be barred by the statute relating to privileged communications.

It is held in most jurisdictions that the information acquired by a physician who has been appointed by the court for the purpose of making a physical examination of either of the parties to the litigation, is a competent witness as to the information learned by him during such examination. See State vs. McCoy, 33 So. 730. In People vs. Seliney, 33 N. E. 150, it was held that a physician who was sent by the prosecution in a criminal action to examine and report on the sanity of a prisoner who was committed on the charge of murder, was not acting in the capacity of an attending physician to a patient, or of a professional adviser, and is competent to testify on the trial of the cause as to what the defendant said to him at the time of such examination, relative to the killing. In re Benson, 16 N. Y. S. 111 it has been held that in an insanity inquest the attending physician is qualified to state whether or not the subject in question was sane or insane.

The mere presence of a physician at the time a certain communication is made, does not make such communication privileged. The person not acting in a professional capacity, although present at the time a communication is made to a physician, is not barred from testifying as to such communication. Sutcliffe vs. Company, 93 N. W. 90. In re Lowensteins estate, 21 N. Y. S. 931, it was held that where a physician not acting in a professional capacity called on a patient and secured knowledge of his condition while on a visit to the medical supervisor of the asylum in which the patient was confined, during which time he assisted the superviser in the discharge of his pro-

fessional duties, such physicians testimony as to the patient's condition is admissible. It was further held that under code 834, providing that a physician shall not be allowed to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, that a physician may testify to any knowledge obtained from personal acquaintance with the diseased patient before the professional relations commenced and after they ceased, but not as to knowledge obtained during the continuance of such professional relation. Likewise in Company vs. Reed, 4 Colo. App. 53 it was held that information of a family physician who had the injured party under his care, based upon his own personal knowledge is admissible in evidence touching the question as to the probability of recovery, and in Harried vs. State, 86, N. W. 306, the court annuonced the doctrine that the code relating to privileged communications does not preclude a physician from testifying as to statements made by the patient regarding his health, nor as to observations made by the physician at times other than during employment. This is classed as personal knowledge, which has nothing to do with the relation of physician and patient, or with the professional capacity of a physician and surgeon.

The courts are strict in limiting the communications to be excluded to statements necessary for the purpose of treatment, etc., and none others. In Compau vs. North, 39 Mich., 606, it was held that a physicians' testimony as to expressing his opinion acquired while he was attending a patient cannot be excluded because it appears that he needed it to enable him to prescribe for the patient. In this action damages were claimed for a physical disability, alleged to have been caused by the defendants' negligence. It was held that the testimony of the plaintiff's physician, that the plaintiff had admitted to him, that the disability complained of had existed before the accident, could not be excluded for it did not appear that the patient's discolsure was necessary to enable the physician to prescribe.

It has been almost universally held that notwithstanding the relation of physician and patient may have existed and that the communication made to the physician would be excluded, still such physician may express his expert opinion based on hypothetical questions as to the cause of the injury to his patient, etc., without violating the statute relating to privileged communications. This has been held in Crago vs. State, 98 N. W. 354. Meyer vs. Association, 40 N. Y. S. 419. Rosenblatt vs. Company, 86 N. Y. S. 801. In the last cited case it was held that the physician who attended the plaintiff in an action for personal injuries may testify as to the probable result of plaintiff's present physical condition. There seems to be some authorities holding contrary to this last proposition.

THE MEDICAL EXPERT

I appreciate thoroughly the compliment of an invitation to speak before a body of professional gentlemen, and felicitate myself on the fact that I have the honor of being the first layman to speak in this distinguished presence.

I have found it extremely difficult to shape my ideas to a topic fit for an address to a gathering of learned and skilled men in a profession other than my own. I apprehend that what I say must have relation to medical jurisprudence, the application of the law to medical situa-

tions or to some phase of medicine or medical men, from the lawyer's standpoint. Any discourse upon dry legal principles, except in so far as they touch some position of interest to the surgeon or physician would, I conceive, be out of place. Lawyers meet the followers of Escolapius mainly in the forum. Occasionally the lot of the lawyer, like that of other unfortunates, constrains them, when in a recumbent position, in a bed chamber, to be meek and slowly, in the face of the learning of the physician, or when on the operating table to become resigned to the skill and the mercy of the surgeon.

At times we, dwelling in amity with our legal brethren, gaze with interested eye at the differences between medical men which reach the surface and disturb the otherwise placid stream of life.

The devotee of Blackstone catches in the acts and words, in the form of the follower of Hippocrates, suggestions that are worthy of deep thought and frank expression. From out these suggestions, I shall say a few words to you this evening, on the qualifications which should be found in the expert medical witness.

Today, the man who is licensed to practice medicine or surgery, is by this fact alone permitted, in the forensic arena, to hold himself forth as alienist, toxicologist, psychologist, anatomist, physicologist and imperious master of all the propositions of delicate judgment and exquisite skill in the whole medical and surgical domain. This system is wrong, and wherever the fault lies, you will be interested in making the assistance which flows from your profession to the administration of the law as throough, as reliable and as complete as possible.

I maintain, therefore, that the medical expert should be educated, able to explain, honest and a specialist in the line in which inquiry is addressed to him.

The medical expert, who is called upon to impart the learning of his cult to the lay judge or the lay juror, should be educated. His thorough education should be a prerequisite and indispensable preliminary to his right to step upon the threshold of the study of medicine. I personally, would have him a finished, college-bred man, but he should surely be able to speak and write English with some sort of appreciative acquaintance with grammer and composition; the lowest standards conceivable would embrace this modicum of education. How a man, without a good education, can expect to master the ponderous, vexingly technical phraseology of any medical text-book or authority is to me an insoluble mystery.

Men of alleged deep and varied medical learning have, on the witness stand, differentiated the syphilitic stages as primary, secondary and "territorial."

How a man without any acquaintance with Latin can assume familiarity with the uses of the innumerable drugs, whose very names are in Latin, is to me an example of atrocious audacity. He should at least have studied medicine at some reputable medical college, to the limit of its course, and his diploma should be an assurance that his studies have been pursued with intelligence and profit so that, so far as human observations could determine, he was possessed of a fair knowledge of the principles of medicine. This is the lowest standard by which the medical expert can be measured.

True, it is easy to conceal his lack of knowledge, so long as the physician flits in and out of the sick room, maintains solemn reticence, and by grave looks or other facial expressions, illumines the minds of the patient and his family as to the exact status of his illness but, at

some time he will be called upon to give testimony of his faith, though it never be until he takes a comfortable seat in the witness chair. On the witness stand, a place which few men can fill satisfactorily, the expert should be able to state and explain the propositions of medical science at hand, in an understandable manner. His function in court is to give to judge or jury the knowledge which he possesses. If his talk is intensely technical, furnished with long medical terms, unpronounceable and untranslatable by the average man, what impression does he produce on the minds of those who, with bated breath, are waiting for information, explanation and knowledge? What light does he pour into the forensic investigation? I have seen in a court room eminent professional men, in explaining the functions of the human body, or the relations of human bones, which should have been interesting, become so technical in their talk as to afford no information whatever to inquiring minds, and reach no result, beyond putting jury, counsel and court in convulsions of laughter, of the reason for which they seemed utterly oblivious. The medical expert should ever bear in mind that he is called to impart knowledge, not to technical minds, but to the untechnical; to minds unlearned in his science or its phraseology. The best witness I ever saw was Dr. John B. Murphy, of Chicago who, on the stand in this city, when asked to describe the conditions of appendicitis and the operation for the removal of the appendix, for over an hour fascinated jury, counsel, court and bystanders by an exposition in plain langauge, which was understood by everyone within the hearing of his voice.

He should be honest, not alone able to know the truth when he finds it, but able and willing to tell it and above all, adhere to it when he does tell it. It is true that medicine is not an exact science, but there are some principles which have become fixed and from which the better sense of the profession will tolerate no deviation. The integrity of the expert should be marked in his course on the witness stand as it would be in his action in treating a patient. Honesty should be a substantial, indispensable ingredient of the medical expert. In this country and age, nothing less could be demanded by the State from the medical witness.

An eminent court, in speaking of the value of expert testimony, has said:

"No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific questions involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so, it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and whether correct or incorrect, cannot be fortified before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect."

The ordinary physician, engaged in ordinary, every-day practice, who, whenever a case of poisoning comes to him, sends it to a toxicologist, is surely not an expert fitted to tell what poison caused the death of a suicide whom he had never seen before. Have you the best evidence when you let such witness tell the action and results of poison in a given case and make no effort to get the opinion of the expert in poisons? Is the oculist and aurist the proper expert to give an opinion on the sanity or insanity of a man or shall we gain this knowledge from the neurologist and alienist, whose experience and study have been devoted to mental troubles? Shall the man who never reduced a dislocation tell us of the propriety of the methods of reduction in preference to the surgeon whose studies and practice have put him in touch with many such cases?

The domain of your science is so broad that no argument is needed to demonstrate that the man who has made special study of certain affections and diseases and the parts of the human anatomy involved therein, and has confined his practice along these lines should be better able to describe to the world the causes, results and proper treatments in such cases than the general practitioner.

The law wants from you, in all judicial investigations, the best ability, the most accurate judgment and the widest knowledge, theoretical and practical, within your grasp. The medical profession elevates itself every time a physician or a surgeon takes the stand who knows what he is talking about, is able to convey that knowledge to his listener, and, better than all, manfully adheres to the truth, as God gives him to know it.

In a crude, hasty way, I have sought to put to you a few promptings of thought which, in my opinion, make for the elevation of the medical expert, for the uplift of your profession, and for the better attainment of truth and justice in the courts of our land.

Delivered before the Allen County Medical Society by W. P. Breen, LL. D.

STRATAGEM OF M'KINLEY

A year or two after the late President McKinley had begun the practice of law he distinguished himself in a humorous fashion in one of his first successful cases.

As often happens in court, the humor was not merely for the sake of the joke, but for serious purposes.

The case was brought against a surgeon whom the plaintiff charged with having set his leg so badly that it was bowed. McKinley defended the surgeon, and found himself pitted against one of the most brilliant lawyers of the American bar.

The latter brought his client into court and made him expose the injured limb to the jury. It was very crooked, and the case looked bad for the surgeon. But McKinley had both his eyes open as usual, and fixed them keenly on the man's other leg. As soon as the plaintiff was under cross-examination by him he asked that the other leg should also be bared.

The plaintiff and his counsel objected vigorously, but unavailing. Then it appeared that the plaintiff's second leg was still more crooked than that which the surgeon had set.

"My client seems to have done better by this man than nature herself did," said McKinley, "and I move that the case be dismissed, with a recommendation to the plaintiff that he have the other leg broken and then set by the surgeon who set the first one."

P. Blakiston's Sons & Company,
1012 Walnut Street, Philadelphia, Pa.

Gentlemen:—Enclosed find money-o'der, $5.50, for Dr. James Tyson's "The Practice of Medicine" (cloth).

Kindly attend to this with your usual promptness. I am especially desirous of perusing the chapter on "Animal Parasites," which has been revised by Dr. Tyson's colleague, Dr. Allen J. Smith. I am informed it is the best in its subject. Respectfully,

(Signed) I. M. A. Wise, M D.

Medico-Legal Bulletin.

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 4 | **MARCH 1906** | No. 6

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

One Dollar Per Annum

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Yes, we do feel better. We have "slicked up" a little and now stand before the mirror of your OPINION.

Talking about opinions—did you ever hear anything but GOOD about the Physicians Defense Company.

In one locality, some legal abortionists attempted to stop the Company from doing business; BECAUSE THE COMPANY WAS MAKING IT IMPOSSIBLE FOR THE AFOREMENTIONED TO PURSUE THEIR NEFARIOUS TRAFFIC OF BLACKMAILING THE REPUTABLE PRACTITIONER.

THANKS. It was the best testimonial we have had, notwithstanding that of the Pittsburg practitioner who said:

"I prevented three suits by referring the prospective litigants to you, and I had the satisfaction of giving one of them a bloody nose, also."

We are FORCED to admit that we have a prophylactic plan—75+25=100—and that the plan is maintained at the highest efficiency.

"DIAGNOSIS"

"The friends of Mr. McCall say that he was beset by legislative blackmailers in almost every State in the Union, that they squeezed the companies a little harder every year, and that before the catastrophe they had pushed their exactions to such a point that the New York Life was paying almost as much in special taxes and license fees as in dividends to policy holders. THE FRIGHTFUL BLUNDER OF TRYING TO BUY OFF THE STRIKERS INSTEAD OF FIGHTING THEM IN THE OPEN BROUGHT NEW SWARMS OF BLACKMAILERS, AND ENDED AT LAST IN DISGRACE AND RUIN."—*Collier's Weekly.*

By the foregoing, the Medical practitioner can see that the disease known as blackmail'em is not confined to any one profession or business. When allowed to run its course, however, the result is identical in each instance—RUIN

"TREATMENT"

The Medical Profession has discovered a prophylactic treatment for blackmail'em, and in the phraseology of a prominent practitioner, it is pertinently stated as follows:

"Carry a contract with the Physicians Defense Company and fight your case to a finish. One of the principal reasons why many malpractice suits are brought is the hope that the practitioner, rather than be worried by a long drawn-out suit and the uncertainty regarding the outcome before the average jury, will settle the case and be blackmailed. This encourages others to file suits, and he who fails to stand up and fight the case through is doing an injury to the whole profession. Nothing discourages attempts of this kind so much as to hand the matter over to this Company. They call the bluff, and at the present time they are preventing nine out of every ten cases.

DON'T YOU BOTHER MOTHER EDDY

Or You are Likely to Receive a Sly Slap on Your Immaterial Wrist

The local congregations of the Church of Christ, Scientist, were notified in the last issue of the publication of the church that the "pastor emeritus," as Mrs. Eddy calls herself, has made a rule that on Christmas, New Year's and Easter no telegrams, letters or gifts of congratulation shall be sent her. Inquiry among the local members of the church resulted in information that the rule applies only to gifts and messages sent to Mrs. Eddy, not between the members themselves. The new rule was promulgated in a message read before all the congregations last Sunday. It is as follows:

"Members of this church who turn their attention from the divine principle of being to personality, sending gifts, congratulatory dispatches or letters to the pastor emeritus on Thanksgiving, Christmas, New Year's or Easter, break a rule of this church and are amenable therefor."

The motive of the stringent rule is, it is said, that Mrs. Eddy is overwhelmed with letters and telegrams on such holidays, causing her a great deal of trouble to acknowledge. It is fair to presume that the time they take diverts her "attention from the divine principle of being to personality."

HAVE YOU A PAD OF THE FOLLOWING?

THEY ARE FREE TO OUR CONTRACT HOLDERS

CONSENT TO OPERATION

I, the undersigned, having engaged

..... physician and surgeon, to administer certain medical and surgical treatment, hereby consent to and authorize the administration and performance of said treatment and operation and any further or additional treatments and operations that may be, in the judgment of said Physician, considered or deemed advisable or necessary, at the time the contemplated treatment or operation is being performed. The intention hereof being to grant authority to administer and perform all and singular any treatments or operations to or upon me which may now or during the contemplated services, be deemed advisable or necessary

Signed.....

....., 190...

I consent to the above.....*

....., 190...

Witness.....

*EITHER HUSBAND, FATHER, GUARDIAN, MOTHER OR NEXT OF KIN SHOULD SIGN.

SAMUEL D. GROSS, M. D., L. L. D., D. C. L.

1805—1884

From the statue erected in Washington, D. C.

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession.

IMPLIED PROMISE TO PAY REASONABLE FEE

LOGAN vs. FIELD, 90 S. W. 127

DECEMBER 12, 1905

On the 24th day of March, 1896, plaintiff instituted suit before Theo. S. Case, a justice of peace of Jackson county, against the defendant, Field, upon an account for $160, for services rendered defendant by plaintiff, as a physician.

The facts are substantially as follows: The plaintiff was a practicing physician, making a specialty of diseases of the nose, throat, and ear. He had treated defendant in the year 1890, and his bill for that service was paid by the defendant. Defendant applied to him again for treatment in the month of October, 1892. The trouble defendant was suffering from in 1890 was different from that with which he was troubled in 1892. In the first instance he had an enlargement or thickening of the mucous membrane or lining of the nasal cavity. The plaintiff cured him, and defendant was not back to see him again until 1892, when plaintiff found that he was suffering from inflammation of the middle turbinate bone, together with inflammation of the frontal sinus. Plaintiff, hoping to relieve the inflammation, and successfully treat the disease without an operation, gave the defendant the treatment sued for, telling the defendant that he could not state whether a cure could be worked, and declined to guaranty that such could be effected. It appears from plaintiff's testimony, that the defendant was benefited; that the case at times grew better; that the treatment administered to relieve the congestion in the canal leading to the sinus was successful, but that, from time to time, defendant would catch cold and violently blow his nose, thus keeping up the inflammation which tended to close the connection between the sinus and the nasal cavity.

On behalf of the plaintiff the court instructed the jury as follows: "(1) If you find and believe from the evidence that the plaintiff rendered the services sued for to the defendant and at his request, and that no price was fixed or agreed upon, then implies a promise from the defendant to pay the plaintiff for such services what the same are reasonably worth, if anything; and this is true without regard to whether the treatment of plaintiff by defendant was beneficial to defendant. (2) If you find and believe from the evidence that the plaintiff rendered the professional services to defendant as claimed by the plaintiff, then plaintiff is entitled to recover what you may find and believe from the evidence such services were reasonably worth, if anything, according to the usual charges of the medical profession in this vicinity; and this is true, although the services rendered may not have produced a cure of the disease with which plaintiff was

suffering. (3) If you find and believe from the evidence that the plaintiff rendered the professional services to defendant as claimed by plaintiff, then the plaintiff is entitled to recover what you may believe from the evidence such services were reasonably worth, if anything, according to the usual charges of the medical profession in this vicinity. (4) If the plaintiff knew that the disease from which the defendant was suffering was in the frontal sinus, and the plaintiff had reasonable cause to believe in the exercise of ordinary care and skill that the same would yield to treatment without an operation, then he had the right to treat defendant for such trouble until such time as he became reasonably certain it was necessary to perform such operation; and he is entitled to recover for such services what the same are reasonably worth, if anything, without regard to whether defendant was benefitted by such treatment or not."

Thereupon the court, at the request of the defendant, and over the objections of the plaintiff, instructed the jury in the words and figures following, except in instruction No. 2, which was a modification by the court of the instruction asked by the defendant; the modification being the striking out of the word "because" before the word "encouraged," and writing in lieu thereof the words "and was;" "(1) The defendant, by submitting himself to plaintiff for treatment, did not confer upon the plaintiff unlimited discretion to run a bill for any kind of treatment and to any extent the plaintiff might see fit to bestow upon him. (2) Defendant had the right to expect good faith from plaintiff, and to rely upon the supposed superior knowledge of the plaintiff to discover, determine, and advise what course should be pursued in his case. If the treatment sued for was worthless to defendant, and if the plaintiff then knew, or ought as a man of his profession to have known, of the uncertainty or probable uncertainty of a cure of defendant from the treatment administered, and the defendant went for and received such treatment, and was encouraged by plaintiff to receive the same, or because plaintiff failed to inform him of the uncertainty or probable uncertainty of a cure from such treatment, the verdict should be for the defendant. (3) Plaintiff had no right, even if in the best of faith, to render service of no substantial benefit to defendant and charge therefore, if he himself had doubt, or as a reasonably prudent and competent doctor ought to have had doubt in his mind, of such service being a successful treatment of defendant's trouble, unless he fully informed defendant of such doubt and defendant, with such information of the uncertainty of the success of the treatment afterward went for and received the same. (4) The plaintiff, in accepting defendant as a patient for the treatment of catarrh of the nose or near thereby, in effect said to defendant that he possessed and would exercise reasonable skill and judgment to discover the trouble and whether it was curable, and that if a cure was doubtful he would inform the defendant of such doubt and not conceal the same from the defendant. (5) If at the beginning of the bill in question, or at any time during the plaintiff's service, the plaintiff was conscious of his inability to understand or properly treat the defendant's trouble, it was his duty to at once fully inform the defendant thereof; concealment by plaintiff of any ignorance of defendant's case in performance of unbeneficial service charged for would be a fraud, and for which service no compensation could be recovered. (6) The plaintiff owed the defendant absolute sincerity in accepting

and keeping him as a patient. If the trouble with which the defendant was suffering, and for which he sought plaintiff's professional aid, was in the frontal sinus over the defendant's right eye, and an operation was then necessary to relieve the trouble of the defendant, and the plaintiff knew this, or could have known it by the exercise of reasonable skill and effort, then his treatment of plaintiff was unskillful and improper, and he ought not to recover any amount in this action. (7) If the jury believe from the evidence that the plaintiff failed to discover and cure the trouble of the defendant because he did not possess reasonable skill or because he did not exercise such skill, the finding should be for the defendant. (8) The plaintiff cannot recover for the service rendered in this case merely because he may have performed such services with the permission or even at the request of the defendant and avoided giving defendant an express guaranty of a cure. The law does not permit a physician to recover compensation for worthless service to a patient, even though he refrained from giving an express guaranty of a cure to defendant before and while performing the service sued for, if such service was negligent, unskillful, or was unfaithfully performed by plaintiff, as submitted in other instructions given to the jury at the request of the defendant. (9) The court instructs the jury that they are not bound to accept the opinion of the doctors who have testified as experts in this case, but may give said opinions and each of them weight as the jury may deem them entitled to, or altogether disregard such opinions in so far as the jury, from all the facts and circumstances in evidence, may believe such opinions unreasonable."

Dr. Dibble, a physician of over 30 years experience as such, testified as expert on behalf of defendant, as follows: "Q. Now, doctor, I will ask you what the proper treatment is of an established case of disease of the frontal sinus? A. If it becomes so bad that there was a disease of the frontal sinus there depending, of course, upon the extent of that disease, it would be an opening into the sinus for the purpose of making applications directly to it; to get an established drainage, in other words. Q. Is that the only effective treatment in such a case? A. As a rule where it is especially bad, where there may be a necrosis or anything of that kind there. Q. Suppose that the patient had been suffering from the disease, prior to the treatment of the physician, for two or three years, and there has been a constant discharge from the nose of inflammatory suppurative pus, occurring not only when he had bad colds, but when de didn't have bad colds, and that that pus was of an offensive odor and of a yellow color, what would it indicate? A. That there was a disease—chronic disease of the frontal sinus. Q. I will ask you to state to the jury whether a mere palliative treatment, such as sprays into the nose of tannin or of vaselin or any other palliative treatment of that sort, would be of any utility in such a case? A. If there was a disease in the frontal sinus itself, you could not reach it with a spray through the nose, only to mitigate the conditions here in the nose itself. In other words, this mucous surface here, enlargement of the bone here, would act as a dam. Of course, there is a natural opening there. If this is congested or the bone enlarged that way, it acts as a dam to prevent the drainage from that sinus, and treatment down here to relieve the inflammatory condition and congestion would allow drainage. If that drainage itself was not sufficient, then there is only one thing, and that

would be an operative interference. That would depend then entirely upon individual judgment of the operator or physician and the condition of the patient. Q. Now suppose the patient, in 1890, had all that done; that is to say, that the physician who treated him (in this case Dr. Logan) established that drainage there by galvanic cautery—that is used to cauterize the part and open the parts up? A. Yes, sir. Q. Suppose that was done in 1890, and the drainage was there, but that the disease in the frontal sinus continued, and that the pus was offensive, and was there all the time constantly, what would be the only thing then to do?" This last question was objected to by plaintiff, upon the ground that it was based upon a condition that had not been shown to exist in the case; but the question was overruled and the witness permitted to answer. His answer was: "It would be a matter of individual judgment then as to the operation. I think I, under the circumstances, should make an operation; but, as I said before, not seeing the case, I couldn't state positively. It would be purely a question of individual judgment as to the operation at that time." The position of the plaintiff respecting the admission of this testimony is that it was inadmissible because the ailment of defendant in 1890 was inflammation of the nasal cavity, while his trouble in 1892 was inflammation above that and extending into the sinus; that the doctor had relieved the first trouble by galvanic cautery, while there was no evidence tending to show that he had cauterized this canal leading to the sinus, where the last trouble existed; yet the question was based on the false promise that in 1890 he had cauterized the said canal. We are inclined to the opinion that no foundation was laid upon which to bottom the question, but the answer to it was so indefinite and unsatisfactory that it could not possibly have prejudiced the plaintiff, and the judgment should not be reversed upon that ground alone.

A point is made upon the ruling of the court in permitting defendant to testify, over the objection of plaintiff, to statements made by Dr. Logan, Sr., to him as to what his son, the plaintiff, had said with respect to the treatment of the defendant by plaintiff and other matters as to defendant's condition. The evidence in question is as follows: "Q. I will get you to state to the jury whether Dr. Logan, Sr., Dr. W. G. Logan, the father of the plaintiff, told you in August, 1893, in his office in the Keith & Perry Bldg., in this city, while his son, Dr. Logan, Jr., was in New York, that there was no use for you to take treatment; that Jim (that is the plaintiff in this case) had long regarded your case as incurable? A. I think you asked me if Dr. W. G. Logan didn't say that to me in his office. It was in his son's office. Q. Well, in his son's office? A. Yes, sir, he said that to me. Q. Well, he stated to you at the time and place I have just stated that his son Jim had long regarded your case as incurable? A. Yes, sir; and that it was useless for me to take treatment." This testimony, as ruled by the court at the time, was admissible for the sole purpose of laying a foundation for impeaching the witness, and not as direct evidence, and some of the testimony, not necessary to point out, was clearly properly admitted for that purpose. Some of these statements were inadmissible for any purpose, but the objection seems to have gone to the testimony under discussion as a whole, and under such circumstances the objection was properly overruled. State vs. Johnson, 76 Mo. 121.

STATE vs. OREDSON, 105 N. W. 188

DECEMBER 22, 1905

The defendant was indicted by the grand jury of St. Louis county "of the crime of practicing medicine in the State of Minnesota without first having obtained a license." The definition of practicing medicine he gave in accordance with the statute, thus: "Any person shall be regarded as practicing within the meaning of this act, who shall append the letters 'M. D.' or 'M. B.' to his or her name, or for a fee prescribe, direct or recommend for the use of any person any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease; and there is a provision that this shall not apply to dentistry."

The question fairly presented to this court for decision is, then, whether the statutory offense consisted merely of prescribing drugs for a fee or of practicing medicine without a license. The act is a beneficial one, and is entitled to a liberal construction. Its purpose was not, as the counsel for the defendant insists, to merely make prescribing for a fee the offense; so that the defendant could have practiced medicine generally, could have held himself out to the world as a physician and surgeon, could have examined patients, and inferentially could have operated upon them as a surgeon for pay, and yet would not have been guilty of a misdemeanor within the meaning of the act. On the contrary, its plain object was to prevent the public wrong of practicing medicine without a license. The act was not enacted for the benefit of any profession or of any school or theory of medicine. It was designed to secure the public in whole and in every part from quacks, humbugs, and charlatans masquerading under the venerable and honorable titles of surgeons, physicians, and doctors, and to protect the public in a just reliance upon the one using these titles as a man of proper education and sufficiently trained in the sciences involved. A just enforcement of that act would tend to prevent the most deplorable swindling of the ignorant poor, who can least afford to pay for the luxury of deception, and who are the most likely to be the dupes of ostensible practitioners, whose competency has not been determined by law, and whose moral deficiencies are evidenced by their false pretenses. Its terms should be construed, so far as reasonably may be, so as to tend to eliminate the suffering of an individual from the misuse of inert drugs when potent ones are needed, and of powerful agencies productive of ill where proper ones might bring relief or effect a cure, so as to avoid many evils of malpractice, and so as to minimize the exposure of the community at large to the spread of avoidable pestilence. The act is at once a statute of frauds and a health ordinance.

Order affirmed.

GLASGOW vs. METROPOLITAN ST. RY. CO.

89 S. W. 915 (Mo.) NOV. 22, 1905

Plaintiff recovered a judgment against the defendant, a street railway company, for $5,000 damages for personal injuries received by her by falling when she was in the act of alighting from one of the defendant's street cars.

Defendant introduced a witness, Dr. Doyle, a practicing physician in Kansas City, who testified that in March, 1900, (which was about six months before the alleged accident), he was called to attend the plaintiff. He was asked what she told him concerning her condition and for what disease he prescribed for her. On objection by plaintiff the testimony was

excluded, and that is assigned for error. The witness was incompetent to testify if the plaintiff objected. The language of our statute (Section 4659, Rev. St. 1899) is: "The following persons shall be incompetent to testify, * * * a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." There was no error in the court's ruling on that point.

The plaintiff called as witness in her own behalf Dr. Roberson, who was the physician she called to attend her in October, 1901, and who had attended her off and on ever since. This witness described the diseased condition in which he found the plaintiff, and, in answer to a hypothetical question of her attorney, which included a fall from a street car, as she had described the accident, testified that a fall of that kind could produce that character of disease. On cross-examination he was asked to state some of the most frequent causes that produced such disease, to which he answered: "Oh, there are so many I don't know." And when asked if the medical books do not say that when such injury follows on a jar or fall it is usually in a case where the parts were already diseased, he answered: "There are cases that way, a great many, certainly." And asked if his books do not teach that, in case there was no previous disease, if a displacement such as he had found in the plaintiff had been caused by a sudden jar, and if it had been immediately put back into position, if it would not in a short while be as well as ever, he answered that some authors say so, but witness thought there were few such cases; but further pressed he said: "If the womb is healthy and in perfect condition and placed back immediately after it was tipped, it would probably in a short time be as sound as it ever was." He also stated that if the injury was not treated for a year it would get worse all the while, and patient would probably never recover. Then on redirect examination he was asked this question by the plaintiff's attorney: From the condition you found her in, assuming as Mr. Loomis says she was a well woman on the 25th day of September, when she got this fall what would be the extent of the fall in order to produce that injury" To which the witness made this answer: "Why, I would think it would be quite a severe fall that caused that." And this question followed: "Now, did you find any other disease, as far as the uterus is concerned, and this trouble that you have been speaking about, with Mrs. Glasgow, except what would have been occasioned by a fall?" The witness answered, "No." To another witness, Dr. Snell, who had examined the plaintiff only two weeks before the trial, a hypothetical question was propounded supposing the plaintiff to have been a sound and healthy woman on September 25th, 1900, and on that day received a fall as she described it, and ever since then she had been suffering in the manner stated, then the question was: "To what would you attribute the injury?" The witness answered: "Well, it would be natural to think if a person was sound and well when they got the fall and was sick immediately afterward, that it was due to the fall; that would be the natural conclusion. Q. Just state what would be the cause of that injury under the state of facts I have mentioned to you in the question? A. You want me to account for the condition I found her in when I examined her? Q. No; I want you to state what in your opinion

would be the cause of the injury, which you found under the facts as I have stated them in the question assuming what I said to be true; that is, she was a well woman on the 25th day of September, and so on, as I stated before? A. Then I would say that it was due to the fall." This witness also testified that there were many causes which produced that particular kind of female trouble, and he enumerated several of them. Defendant interposed timely objections to all those questions which called upon the witness to say what was the cause that produced the plaintiff's affliction; the objections were overruled, and exceptions taken.

Those objections ought to have been sustained. It was competent for the learned witnesses to state what cause or causes might produce such a result, and this both of them did without objections, stating that such a fall could produce it and that there were many causes which would produce the same effect; but it was incompetent for them to say that in this case the plaintiff's condition was, in their opinion, the result of the alleged fall. It was competent for them in giving their opinions, to speak of that which they knew from their scientific learning and experience; it was not competent for them to draw conclusions of facts from the evidence in the case, yet that is what they did. If the jury gave credit to the testimony of the physicians, the verdict paraphrased would say: We the jury find that whilst the plaintiff's affliction might have resulted from many causes, yet the doctors said it was the result of the fall, and we therefore so find. The court in giving its approval to this testimony said to the jury, in effect, whilst it is your duty to ascertain from all the evidence in the case whether or not the plaintiff's disease was produced by the fall she claims to have received, and whilst these learned gentlemen have said that there are many causes that produce such disease, yet in their opinion the plaintiff's trouble was produced by a fall, therefore, if you think these men worthy of credit, you may base your verdict on their opinion and find that there was a fall and that it produced this result. It in effect authorized the jury to adopt the conclusions drawn by the experts from the evidence rather than to draw their own conclusions. We must remember that the allegation that the plaintiff had fallen from a car at all was denied, and the burden of proving it was on the plaintiff. The record does not show that the defendant corporation ever heard of the accident until suit was brought, one and one-half years after it is alleged to have occurred. The plaintiff having in her disposition stated that the car from which she fell was No. 152, the conductor of the car of that number and of the date named was called by the defendant as a witness and testified that no such accident occurred under his administration. But the testimony of these expert witnesses went to establish the fact of the alleged fall, which was not a fact they learned from the medical books. Thus the weight of their testimony went into the scales on the question of whether or not there was an accident. There are cases in which a physician or surgeon may give his opinion, not only as to what might produce a given result, but also as to what in fact did produce the particular result in hand. But such are cases where no other cause could reasonably have produced the effect Instances of this kind are found in murder cases where the cause of the death is the question. A dead body is found floating in the river—to the eye of the casual observer it is a case of drowning, but a man of science makes an examination, and testifies that the condition that would

result from drowning is absent, the condition resulting in death from poison is present, and no other cause that could produce death appears, therefore he may say it was a case of death by poison. Perhaps even in such case it would be more correct to limit the expert testimony to a statement of the scientific facts, leaving the inevitable conclusion to be drawn by the jury; but, when after the scientific facts are proven there is but one conclusion to be drawn, it is not harmful error to allow the witness to state his conclusion. But such is very different from the case at bar. Here these learned men tell us that many causes produce a like result, and they do not say that one is even more probable than another, yet they are allowed to say that this injury was produced by a fall, and one of them said in effect that it was a severe fall.

The defendant's evidence tended to show that the plaintiff was afflicted in this manner before the date of the fall, from which evidence, if believed, the jury would have concluded that, although a fall from a car might have produced such a result, yet it did not produce it in this case, and that the plaintiff's condition was attributable to some one or other of the many causes that might have produced it. But when the jury were told by the doctors that the fall did produce it, then, if the jury judged the doctors to be creditable witnesses, it shut off all other inquiry. If the doctors in the matter of their opinions had kept within the realm of their science, the jury would have had the right to weigh their evidence against that of the defendant's witnesses and credit them in preference to the others, but outside of their field their opinions were mere conclusions drawn from the evidence and were not entitled to be considered at all. Dr. Snell seemed to realize that he was being asked to invade the province of the jury, and he seemed reluctant to be led beyond the realm of his science. His first answer to the hypothetical question was that if a person was entirely well before he got a fall and was sick immediately afterwards the natural conclusion would be that the illness was due to the fall. This witness, however, was not there to draw natural conclusions, any man of common sense could do that—he was there to tell the jury that which they could notknow, without the aid of abstruse science. Then he was asked: "Just state what would be the cause of that injury under the facts I have mentioned to you in the question." His answer seems to indicate surprise at the question. He said: "You want me to account for the condition I found her in when I examined her?" The counsel disclaimed any such purpose, and yet repeated his question in such form as to bring this answer: "Then I would say it was due to the fall." The incompetency of such evidence is forcibly illustrated by the facts of this case. Dr. Robinson did not see the plaintiff until thirteen months after the alleged accident. Dr. Snell did not see her until more than two years thereafter. The former testified that while a fall or jar could produce such a result, yet the books taught that such was not likely unless the parts were already weakened by disease, and they both testified that in case of previous healthy condition a displacement by a jar or fall treated promptly by replacement would soon result in perfect restoration, that if neglected for a year or more the condition would grow from bad to worse and become a permanent affliction. Yet they were allowed to assume the case in the condition they found it, and to say that, assuming that she suffered such a fall as she described, the condition in which they found her was the result of that fall.

The view of the law on this subject as above taken conforms to the views this court has taken in other cases. In one of our recent decisions (Taylor vs. Railway Co., 185 Mo. 239, 84 S. W. 893), after quoting from Judge Black in Gutridge vs. Railroad, 94 Mo. 100, cit. 472, 7 S. W. 476, 4 Am. St. Rep, 392, Judge Brace in Boottger vs. Iron County, 136 Mo. 336, 38 S. W. 298, and Judge Williams in Langston vs. Railroad, 147 Mo. 465, 48 S. W. 835, all declaring the same doctrine, Marshall J., speaking for the court said: "It would have been proper to have stated to the plaintiff's experts the nature and extent of the injuries received by the plaintiff as they appeared at the time for the accident and then to ask them whether or not in their opinion such injuries might could, or would result in paralysis. The experts having thus given an opinion, it would have been for the jury to find the fact as to whether or not in this particular case the paralysis was caused, as the plaintiff's expert witness said it might have been caused, or whether it was the result of other causes, as the defendant's experts testified might be the case. To the trained legal mind there is a very essential difference between permitting an expert to give an opinion and permitting him to draw a conclusion. The one is the province of a witness, the other is, in the first instance, the special prerogative of the jury. And when a witness is thus permitted by the court to invade the province of the jury, it goes to the jury with the indorsement of the court, and is calculated to make the jury believe that it was proper for the witness to find the fact instead of the jury doing so. The ruling of the court upon the admission of this testimony was therefore erroneous." Other decisions of this court cited in the brief of appellant are to the same effect: Gavisk vs. Railroad, 49 Mo. 276; Koons vs. Railway, 65 Mo. 579; Eubank vs. Edina, 88 Mo. 655; Koenig vs. Railway, 175 Mo. 698, 75 S. W. 637.

The case of Wood vs. Railway, 181 Mo. 433, 81 S. W. 152, to which we are referred by respondent does not conflict with the views taken of this subject in the cases above cited. The hypothetical question therein discussed and approved did not ask the expert witness if the fall in that case produced the disease under which the plaintiff suffered, but, after stating facts assumed, it concluded thus: "I will get you to state whether or not the injury that I have described was in your opinion—the injury and the fall—was in your opinion, in her case, sufficient to produce the disease of neurasthenia which you found her to be suffering with upon your examination at Kansas City last fall." The question was not, did the fall produce that disease? but, was it in your opinion sufficient to produce it? That question was entirely competent under the rules of law we have above declared. In the case at bar the question was not, was the fall from the street car described sufficient to have produced the displacement of the uterus? but it was, did the fall produce it? An affirmative answer to the question in the one form, though credited as true, would still have left the jury to find from all the evidence in the case whether or not the affliction under which the witness found the plaintiff suffering was caused by a fall from a street car; an affirmative answer to the question in the other form, if credited, would have closed the inquiry. In O'Neil vs. Kansas City, 178 Mo. 91, 77 S. W. 64, to which we are also referred, the hypothetical question did contain this objectionable feature, but there was not objection made to it on that ground. This court in passing on the question said: "The objection was so general that it did

not give the trial court any opportunity to know what, in the opinion of the counsel making it, was the view of the hypothetical question, either in what it contained or what it omitted, and when invited to specify his objection he declined to do so." That case, therefore, does not sustain the trial court's ruling in the case at bar on this point. The court erred in overruling the defendant's objections to the hypothetical questions.

INSURANCE CO. vs. WILLIS, N. E. (IND.)
506, JANUARY 3, 1906

The policy of insurance upon which the action is based was issued upon the written application of the insured. In that application he answered certain questions, and warranted such questions to be true. Such warranty is as follows: "And I further declare, warrant, and agree that the representations and answers made above are strictly correct and wholly true, that they shall form the basis and become part of the contract of insurance, if one is issued, and that any untrue answers will render the policy null and void, and that said contract shall not be binding upon the company unless upon its date and delivery the insured be alive and in sound health; * * * * and I expressly agree and stipulate that in any suit upon the policy herein applied for, any physician who has attended or may hereafter attend me may disclose any information acquired by him in any wise affecting the declarations and warranties herein made." In his application his answers and representations that are at all material are as follows: "I have never had any disease of the brain. * * * I am now in sound health, * * * nor have I any * * * * * mental defect or infirmity of any kind. * * * The following is the name of the physician who last attended me, the date of the attendance, and the name of the complaint for which he attended me: 1900. Xr. Johnson. Grip. * * * * I have not been under the care of any physician within two years, unless as stated in the previous line, except (blank). * * * I have never met with any serious personal injury, nor never been seriously ill, except at stated below, and for the complaint named, and no other, when I was attended by the following named physicians and no other (blank)." This application was made and dated June 1, 1901. The policy was dated June 10, 1901, and delivered the following day. Between the dates of the application and the delivery of the policy and inquest had been held, inquiring into the mental condition of the insured, and he was declared to be insane, and was ordered to be incarcerated in the insane asylum. He was so incarcerated, and within about two years died of paresis. The evidence is without contradiction that the insured was insane for some time before he applied for insurance, and was so when the policy was issued; that he remained in that condition until he died; and that the cause of his death was a diseased brain. The evidence also shows that about five years before the policy was issued the insured received a great mental shock by having a sunstroke. It also shows that in 1899 he had malaria fever, and was attended by Xr. Johnson; also that for six months or more before June, 1901, he had been attended and prescribed for by two other physicians. The policy recites that it is issued upon the written application of the insured, and that no obligation is assumed, unless, on the date the policy is delivered, the is alive and in sound health." The evidence shows conclusively that he was not in "sound health" when the policy was

delivered. It is unnecessary to cite authorities in support of the proposition that an insurance company has the right to make such conditions a part of its contract of insurance. These undisputed facts established such a breach of the contract as to relieve appellant of liability Neff. vs. Metropolitan, etc., Co. (Ind. App.) 73 N. E. 1041; Thompson vs. Travelers' Ins. Co. (N. D.) 101 N. W. 900; Stringham vs. Mutual Life Ins, Co. (Or.) 75 Pac. 822.

* * *

The remaining question for decision is the exclusion of evidence offered by appellant. In the application for insurance for insurance the insured "expressly agreed and stipulated that in any suit on the policy any physician who had attended him might disclose any information acquired by him in any wise affecting the declarations and warranties" made in the application. A physician was called to visit the insured on June 4, 1901, and appellant examined him as a witness in its behalf. He was asked this question: "What disease, if any, was he afflicted with at that time?" Objection was made that the witness was not competent to testify and answer the question, for the reason that it was a "privileged communication between physician and patient." Appellant offered to prove by the answer that at the time the insured was suffering from disease of the brain, etc. The statute (subdivision 4, Sec 505, Burns' Ann. St. 1901) which makes inviolate matters communicated by a patient to his physician in the course of his professional business has always been strictly construed, and the rule is that such confidential relations will be protected by the courts except where the patient consents to their revelation by the physician. In Penn Mutual, etc., Co. vs. Wiler, 100 Ind. 92, 50 Am. Rep. 769, it was said: "Notwithstanding the absolutely prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive it." Here the assured, by an agreement in writing, waived this waived this statutory privilege, and we have no doubt but what he had a right to do so. His waiver must operate as such to these claiming under him. Adreveno vs. Mutual Reserve, etc., Co., (C. C.) 34 Fed. 870; Foley vs. Royal Arcanum 151 N. Y. 196, 45 N. E. 456, 56 Am. St. Rep. 621. Our conclusion is that the court erred in excluding the evidence.

We cannot, however, regard that as reversible error, for the exclusion of the evidence in no wise prejudiced the rights of appellant. For the reasons stated, appellee was entitled to judgment, and the result could not have been different if the excluded evidence had been admitted.

Missouri Ry. Co. vs. Lynch, 90 S.W. 511
November 11, 1905

This was a suit for damages on account of personal injuries sustained by the plaintiff. During the trial, and while plaintiff's witness, Dr. W. G. Rutledge, was on the stand, the plaintiff's counsel had the plaintiff to come around in front of the jury, take off his shoes and socks, and pull up his trousers and underwear, so as to expose his limbs above the knees, and then requested the witness, Dr. Rutledge to show the jury and demonstrate the plaintiff's sensibility or lack of sensibility in his limbs. The witness then proceeded as follows: "As I said a while ago he has a loss of sensation. His feet stay cold all the time. There is no feeling down there. You can pinch it as deep as you want to and it don't make any dif-

ference. There is no sensation whatever. (Here the witness stuck pins in the plaintiff's limbs in various places, and continued the process until the blood was running freely from one place in one limb.; You can light a match and burn him, if you want. The other is the same as this one (continuing to prick the other limb.) However, the left is a little better leg than the other. He seems to sort of bring it up from the hip and brace himself on it, so he can walk on his crutches." Then (turning to the jury: "If you would like for me to, I will stick a match under it. He won't have any pain about it at all. It will make a blister, of course." And, while said witness was on the stand, the plaintiff's counsel had the plaintiff stand up in front of the jury, and requested the witness to remove his crutches The witness then proceeded to take one crutch from under the plaintiff, leaving the plaintiff standing on the other, and then forcibly moved the latter, allowing the plaintiff to fall nearly to the floor, whereupon the witness, who was a very strong man, caught the plaintiff, raised him up, stood him erect, and then turned him loose and let him fall again, this time, as before, catching him just before he struck the floor. To these proceedings the defendant objected, on the ground that they were improper and calculated to prejudice the minds of the jury. The objection was overruled, and the evidence admitted. The evidence was admissible as tending to show the nature and extent of appellee's injuries. This evidence could only have effected the amount of the recovery, and, as there is no complaint made that the verdict is excessive, the defendant could not have been harmed by its admission.

The trial court did not err in admitting the testimony of Dr. Moore, that in his opinion, from all the history given him of the case, and from what he saw about the plaintiff, and the length of time that had elapsed since the injury, it would indicate more the idea of permanency in his condition than not. The witness was a medical expert, and could give his opinion, based on his examination and the history of the case received from the plaintiff. The appellant could, on cross-examination of the witness, have shown that the history of the case received by the witness from the appellee was not correct. The evidence went only on the extent of the injuries of appellee, and no complaint is made of the excessiveness of the verdict.

Reynolds vs. R. R. Co., 90 S. W. 100

November 6, 1905

Where a railroad claim agent visited injured persons, employed doctors, and consulted with them as to the condition and treatment of the injured, and the railroad paid for the services of such doctors, the jury could find that the agent, when he employed and agreed to pay a certain doctor for his attendance on an injured person, was acting within the scope of his authority.

Restrictions imposed by the principle on the ostensible authority of the agent have no effects on the rights of third persons, who have no knowledge of such restrictions.

For cases in point see vol. 40, Cent. Dig. Principal and Agent, 377.

Where a railroad's claim agent, within his authority, agreed to pay a physician for his services to an injured person, it was immaterial, on the question of the railroad's liability, whether such agreement was made with the physician or the injured person, and whether the agent employed the physician to render the services in the first place.

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Figure 1

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Figure 2

Figure 3

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MEDICO-LEGAL BULLETIN

V4 #7

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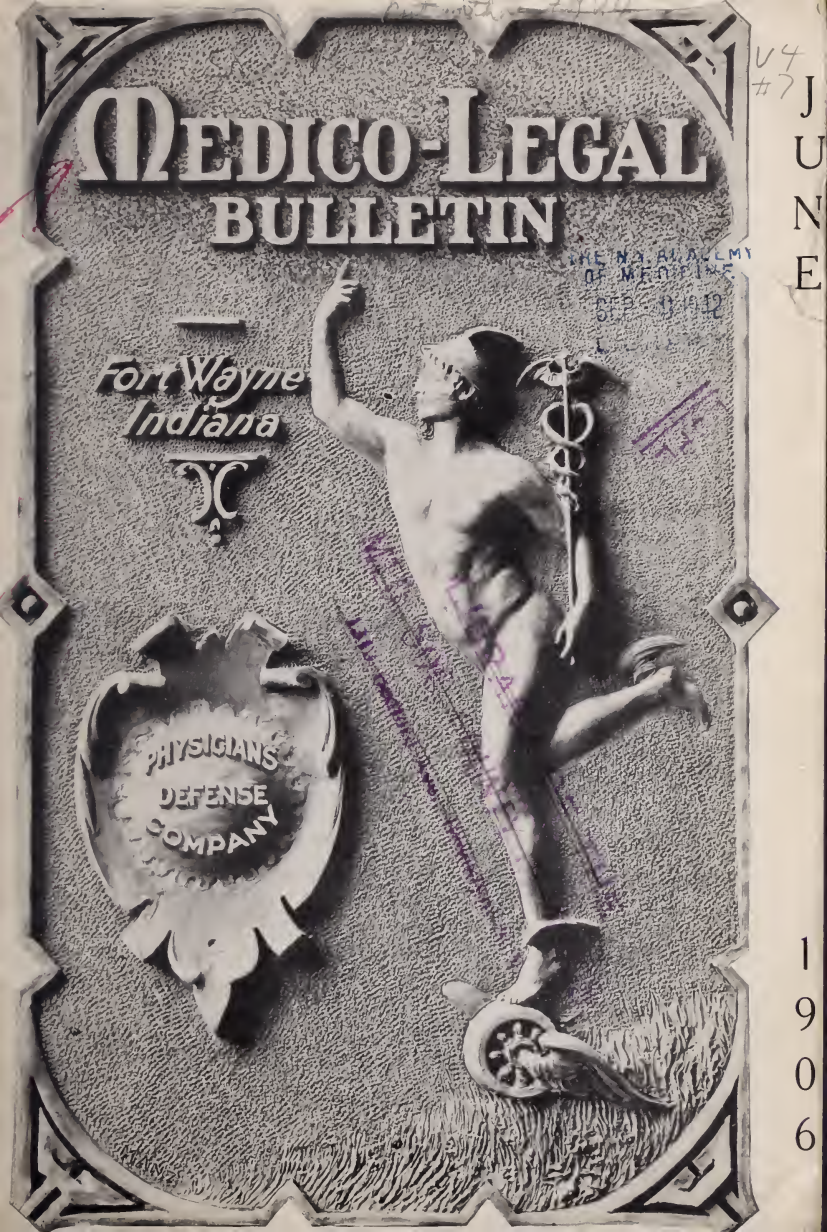

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I practice under the.....School of Medicine; and have been duly Registered and Licensed to practice in this County, and under the laws of this State and am a member in good standing in the.....

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I agree to notify the Company at once by telegraph when demand is made or suit commenced for damages, and to immediately forward by mail any summons served, copy of the complaint filed, a history of the case and of the services rendered as per instructions from the Home Office, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance, not pecuniary, in defense of the case, without charge to the Company.

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hereby agrees to defend the legally qualified Physician,

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of _____, County of _____, State of _____

against all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding FIVE THOUSAND DOLLARS in defense of any one suit, nor exceeding in the aggregate TEN THOUSAND DOLLARS in defense of suits based on services rendered by the holder hereof, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:

Immediate notice by telegram must be given the company at the Home Office in Fort Wayne, Ind., of any suit brought or demand made and the holder hereof shall immediately forward the summons, or other process served, or the assignment or petition filed, together with a full and complete history of the case and accurate records.

Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney in whose practice the holder hereof shall have no other, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until otherwise lost by appeal, and if error or other legal proceedings shall have been taken by or on behalf of such the case of Dr. Thomas Holmes shall have been expended to said defense, provided and company shall not be under obligations to expend more than Ten Thousand Dollars in the aggregate in the defense of suits based on services rendered, by the holder hereof, during the original one year term or any renewed one year term of this contract.

Said company does not obligate itself to pay or to assume or be secure the payment of any judgment rendered against the holder hereof, in any suit defended for it.

The company shall not compromise any suit or claim for malpractice against the holder hereof. Nor shall the holder hereof, after the company has entered upon the defense of any such suit in behalf of the said the holder, compromise the same without the consent of the company in writing, and therein had, and by reimbursement to the company for expenses thereinbefore incurred.

No suit or claim will be defended by this company, under the contract, in which the cause of action arose prior to the date of this contract.

This contract does not cover criminal prosecution nor suits for assault, criminal abortion, suicide, homicide or other criminal act, or actions arising by way of counter claim or recoupment.

The company may cancel at any time the unexpired portion of this contract upon written notice to the holder hereof and the unearned portion of the consideration therefor shall be returned to the holder hereof.

This contract does not take effect until the same therein shall be actually paid to the company or its authorized agent, but if the holder shall have paid such consideration and shall have received from the company or its duly authorized agent a memorandum certifying such payment and that the contract is to be subsequently delivered, then this contract shall be dated as of the date of such payment and shall be in force and effect from that date.

This contract shall not take effect at the end of the term as stated above, if the holder hereof shall not file the same and application for admission at the Home Office in Fort Wayne, Ind., or be not authorized agent of the company, its officers for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term, or for the for which such annual consideration shall be paid; provided, however, that the liability of the company under such extension shall not be cumulative.

No consideration or agreement contained in this contract, or application for same, can be added or altered in any manner by any person, other than the president or secretary, in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto at

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of _____, 19____.

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President

E. H. Merritt
Secretary.

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MEDICO-LEGAL BULLETIN

VOL. 4 SEPTEMBER 1906 No. 8

Leading Original Articles

THE PHYSICIAN'S LEGAL DUTY TO ATTEND UPON PATIENTS

It is the purpose of this article to discuss the duties which the law imposes upon a physician in regard to accepting employment and continuing his attendance upon patients when the employment has been accepted.

There appears to be a popular impression among many physicians that, by reason of the special privileges and immunities which the physician enjoys, he is under a legal duty to accept employment from any person who requests his professional attention; the idea seeming to be that he is under much the same sort of a duty as is the common carrier or inn keeper at the common law to render services to whomsoever may apply. There is in the law no foundation for this impression, and indeed there are express decisions to the contrary. In the case of Hurly vs. Eddingfield, 156 Ind. 416, it was expressly held that not only was there no such obligation resting upon the doctor at common law, but also that the existance of a statute regulating the practice of medicine and granting licenses to those found qualified, did not by inference create any such obligation. In this case, the defendant physician had been the decedents family physician. The decedent became dangerously ill and sent for the defendant. The messenger informed the defendant of the decedents' violent sickness, tendered him his fees for his services and stated to him that no other physician was procurable in time, and that decedent relied upon him for attention. Without any reason whatever, the defendant refused to render aid to the decedent. Death ensued owing to the defendants' refusal. On this statement of facts, the court held that the defendant had not been guilty of any wrongful act, saying: "Counsel did not contend that before the enactment of the law regulating the practice of medicine, physicians were bound to render professional services to everyone who applied. The act regulating the practice of medicine provides for a board of examiners, standards of qualifications, examinations, licenses to those found qualified, and penalties for practicing without licenses. The act is a preventive, not a compulsive measure. In obtaining the state license to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsels analogies drawn from the obligations to the public on the part of inn keepers, common carriers, and the like, are beside the mark."

Where, however, the physician has once taken charge of a case, he assumes certain duties with regard to his attendance upon the patient which the law implies. In this, as in many other instances, the law takes cognizance of the relationship between the parties and of all the surrounding circumstances, and in the absence of any express agreement

between the parties assumes that they have dealt with one another on the basis of such a contract as justice and reason would dictate. Accordingly, the law implies that where a physician has commenced to attend upon a patient, he has agreed that he will render him such services as the advanced state of the profession in his or similar localities deems necessary, and will continue his attendance so long as the patient requires his aid; and inasmuch as the law further implies that the physician represents himself to have ordinary skill in his profession, he is held to the use of such ordinary skill in determining when his visits may be safely discontinued. Should the physician fail to pay proper regard to this obligation and fail to visit the patient as frequently as his case demands, or ceases his attendance at a time when the exercise of a skilled and properly educated judgment would demand his continuing his attendance, he will be held liable for damages resulting from such failure in an action brought by the patient.

By natural inference from the fact that the physicians' duty to continue his attendance rests upon an implied contract, it follows that the physician may limit or change this duty by an express stipulation at the time of undertaking the case. Thus, a surgeon might, by express words, when undertaking to perform a certain operation, free himself from the duty to follow the operation with care, and attendance upon the person operated upon, or a physician might expressly limit the time within which he would continue his attention, or might make the continuance of his visits conditional upon certain acts upon the part of the patient. The duty to continue his attendance as long as the illness of the patient lasts, only arises when there is no express understanding between the parties. These principles are exemplified in the case of Mucci vs. Houghton, 57, N. W. 305. The facts of the treatment in this case were as follows: A fracture was sustained by the patient on June 11. After giving attention to the injury, until the 7th day of August, by examining the condition of the fracture, the cast was removed, and the surgical attention ceased. The plaintiff claimed that when the treatment ceased, the injury was not cured, but a false joint was created between the elbow and wrist at the place of fracture. The Supreme Court upheld the following instructions given by the lower court to the jury:

"If a physician or surgeon be sent for to attend a patient, the effect of his responding to the call, in the absence of a special agreement, will be an engagement to attend the case as long as it needs attention, unless he gives notice of his intention to discontinue his services, or is dismissed by the patient; and he is bound to exercise reasonable and ordinary care and skill in determining when he should discontinue his treatment and services. If you find from the evidence that the condition of the plaintiff's arm is due to his having been dismissed when he ought not to have been dismissed, the defendant would be liable, unless the evidence further satisfied you that the defendant, in dismissing him, if he did dismiss him, used ordinary and reasonable care and skill in determining when to dismiss him; and, if he dismissed him under a mistaken judgment, he would be liable, and you should hold him liable unless you find from the evidence that, in making up his mind when to dismiss him, he exercised reasonable and ordinary care and skill, and had regard for,

and took into account, the well settled rules and principles of medical and surgical science."

As to the frequency of the visits which a physician should make upon his patient, the physician is the sole judge, but in deciding this question he must use the best judgment of a properly educated, and ordinarily careful and skillful physician, and if he is guilty of carelessness or ignorance in allowing an undue lapse of time between his visits, he is liable in damages for any injury to the patient resulting therefrom. It has been often decided in suits for fees by physicians, that the doctor is the proper and sole judge of the necessary frequency of his visits, so that in an action for his services he is not required to prove the necessity of his making the number of visits that he makes and for which he seeks compensation. Conversely he is bound to render as frequent visits as is the custom and practice of physicians in good standing in similar localities in the treatment of similar cases. If, however, he is especially requested by the patient, who desires to save expenses, to make less frequent visits than he would otherwise make, he would probably be excused from liabiiity for any damages resulting from the infrequency of his visits, although it is also true that such conduct on the part of the patient would justify him in refusing to further attend.

The most important question arising on this subject, is as to when and how the duty to continue attendance after the relationship of physician and patient has arisen, may be terminated. While, as already stated, a contact arises immediately upon the physicians accepting employment, that he will continue his services as long as needed, yet this contract is one which may be discharged by either party at any time. In other words, neither the physician nor the patient is bound to continue their relations longer than is pleasing to them, provided only that the party desiring to terminate the relationship give the other reasonable notice. Thus, in the case of Dashiel vs. Griffith, 84 Md. 363, the court says: "In consequence of the illness and death of the defendant physician's father, he was continuously absent from his office and did not see plaintiff until after the finger had, on March 2nd, been amputated. If the defendant had, in his treatment of the finger, prior to the 24th of February, exercised reasonable care and skill and diligence, and then, because of the illness of his father, had turned the plaintiff over to Dr. C., a competent physician, for the further treatment of his finger, and the plaintiff refused to go to Dr. C. for treatment, then the liability of the defendant ceased, and the plaintiff assumed to herself the consequences of any injury resulting from the neglect of her finger, for it cannot be said that the defendant, under any and all circumstances, was required to continue the treatment of the plaintiff. If he provides for the further treatment of the patient in such a manner as the defendant did in the case under consideration here, he has complied with every reasonable demand upon him."

It is ordinarily stated, that the physician may cease his visits without coming under any liability for resultant injuries; first when dismissed by the patient; second, upon giving the patient timely notice so that he may employ another doctor; third, when the condition of the patient is such as no longer to require medical treatment. It is self evident, that where a patient dismisses his physician or requests him not to call again until sent for, that the physician should

not be responsible for lack of subsequent treatment, even though at the time of such request, it was evident to his skilled judgment that the patient should have continued under his treatment, and that there was danger in discontinuing it. In the case of Geddney vs. Kingsley, 16 N. Y. S. 792, the plaintiff had injured her arm and sent for the defendant. The defendant made two visits and then ceased to attend the plaintiff at her own request. The court says at page 793: "The negligence and unskillfulness of the defendant are claimed on two grounds: 1st, he failed to discover the fracture; and, 2nd, he failed to continue his visits, and let the evil effects of the fracture continue until it was too late to restore the fractured arm to its normal condition. The evidence on both of these questions was contradictory. If the arm was so swollen that a complete assurance of the extent of the injury could not be discovered by a careful and skillful examination, and if the swelling was suffered to go on because the defendant was told to wait until he was sent for to continue the attendance, the case will fail for lack of proof. This was the finding of the jury, and the proof is sufficient to uphold the verdict. The parties differ in their remembrance of the facts. Dr. Haight, who examined the arm before the defendant, supports the defendant in his statement that the extent of the swelling prevented an examination which was needed to discover this fracture. The medical experts differ also upon the question whether a skillful surgeon ought to have discovered the fracture, but all agree that the swelling should have been reduced, and, if the plaintiff prevented that by requesting the defendant to make no other visits, on account of the expense, until he was notified, the defendant could not properly be blamed for the omission to diligently look after the case."

Where the physician wishes to give up or cease his attention, either permanently or temporarily, he must give the patient sufficient notice of his intention, to allow him to make arrangements with another doctor. As to just what is sufficient notice, will depend upon the circumstances of the particular case. Where the condition of the patient is dangerous and requires constant medical care and attention, it would of course be necessary for the attendant physician to give such warning to the patient as would enable him to employ another physician to take immediate charge of his case, upon the cessation of the former physicians' attendance. A very interesting case in this connection is that of Lathrope vs. Flood, 63 Pac 1007, which was decided by the Supreme Court of California in 1901. In this case defendant had been employed to attend plaintiff during her first confinement. At the beginning of her labor, he was sent for and attended. He attempted to aid in the delivery of the child by the use of instruments. He inserted the instruments, whereupon the woman in fear or pain, shrank back, compelling the doctor to let go of the instruments or greatly imperil the lives of the mother or child. He made a second effort with a like result; and perhaps a third; though this was in controversy. The doctor testified that he warned the woman to be quiet, and explained to her the danger to herself and the infant, and finally told her that "if she did not quit, he would quit." After the second or third attempt to employ the instruments the defendant abruptly left the house without any explanation or suggestion to anyone. This was about midnight. The husband followed the

doctor into the street asking him to return, but the defendant refused and walked away. After the interval of a half hour or more, the presence of another physician was secured. He found her not so far advanced in parturition as to require the use of instruments, until some 6 or 8 hours afterwards, when by their aid he delivered her of an infant which lived about 8 minutes. It did not appear that any injuries were inflicted by the defendant's treatment up to the time of his abandonment. Verdict for the plaintiff for $2,000.

The court says at page 1007: "It is the undoubted law that a physician may elect whether or not he will give his services to a case, but, having accepted his employment, and entered upon the discharge of his duties, he is bound to devote to the patient his best skill and attention, and to abandon the case only under one of two conditions: first, where the contract is terminated by the employer, which termination may be made immediate; second, where it is terminated by the physician, which can only be done after due notice, and an ample opportunity afforded to secure the presence of other medical attendance. Much expert testimony was given by physicians in this case to the effect that the relation of confidence between physician and patient is all-important, and that a physician is justified in abandoning a case where that relationship does not exist. This is quite true, but the circumstances of abandonment are equally important. He can never be justified in abandoning it as did this defendant, and the facts show a negligence in its character amounting well-nigh to brutality. A young woman is in the throes of labor with her first confinement. She is suffering apparently not only the natural travail, but something more. Her condition is such that the physician has decided that the time to employ instruments to aid her delivery is at hand. He does employ them; and because the woman in her fear and anguish, is refractory, he, as he himself testified, "became disgusted," he was not a child to be trifled with;" and so leaves the house in the dead hour of the night, without time or opportunity afforded for the family to procure the attendance of another doctor. Such conduct evidenced a wanton disregard, not only of professional ethics, but of the terms of his actual contract. It was a violation of that contract, and for all damages that resulted, the defendant is justly responsible."

Ordinarily, where there is no such immediate necessity for continued attention as in this case, the doctor would not be required to continue his attention up to the very time of the arrival of the one who is to take his place, but could abandon the case whenever he chose, provided only that he used proper judgment in determining whether or not there was a fair opportunity for the patient to secure other medical attendance in time to prevent injurious results from lack of attention. As to whether or not he had exercised proper judgment, would depend upon the consideration of locality, time, the patient's condition, and all other surrounding circumstances, and the question would be decided very largely from the testimony of other physicians as expert witnesses. A very interesting question might arise as to the duty of a physician to instruct his successor in the history of the case and of the treatment administered, and it might even be held that, where the peculiar nature of the disease prevented anyone who took charge of the case, after it had advanced through the preliminary stages, from rendering effective services, a physician

would be bound to continue his attendance to the end. So far as I have been able to learn, however, these questions have never been passed upon by the courts.

Most of the cases on this subject have arisen out of the alleged failure of the physician to properly notify his patients that he was about to take a vacation, or leave his practice temporarily, and the question in these cases has been one not so much of law, as of evidence. The doctor usually testifies that he gave his patients proper notice, and referred them to some other physician who would take charge of their cases during his absence, while the plaintiff testifies that he received no such notice. In a suit arising in Ohio, and decided by Judge Taft, of the United States Circuit Court, it was held that the question as to whether or not the defendant had been guilty of malpractice, resulting in the loss of the plaintiff's eye, might depend upon the question as to whether or not the defendant's office girl had informed the patient that she was to go to a certain doctor for treatment during the defendant's absence. In the case of Gerken vs. Plimpton, 70 N. Y. S., 793, the question was as to whether or not the defendant had returned from his vacation within the time stated by him to the patient that he would return. The defendant in this case had set the plaintiff's arm and had attended her for some months, when he told the plaintiff that he was going away on his vacation. Plaintiff testified that at this time, the defendant stated that he would be back within ten days or two weeks, and in the meantime, directed her to keep her arm in the sling. The defendant testified that he told the plaintiff that he was going away on his vacation for 2 or 3 weeks, and that if she desired him to call again, she must send for him. The defendant did not return for five weeks, when he again examined the arm, and found that the bones had slipped and overlapped. The court says at page 794: "If, on this 12th day of September, he told the plaintiff that he would return in 10 days or two weeks, and gave her instructions as to the course she should follow in the meantime, and he failed to return for five weeks, and if, in consequence of this failure to properly treat her during that interval, this injury resulted, it would seem that the jury were justified in finding that the defendant was negligent in this particular. A physician who undertakes the treatment of a patient is bound to exercise not only the skil required, but also care and attention, in attending his patient until he notifies the patient that his professional relations are terminated. * * * And when a physician is employed to attend upon a sick patient his employment continues while the sickness lasts, and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician. Potter vs. Virgil, 67 Barb. 580. The case depends upon the interview on the 12th day of September and I think the jury were justified in finding, if they believed the plaintiff's version of that interview, that the defendant had been negligent in the discharge of his duties which he had assumed in relation to the plaintiff."

It is to be noted in this connection, that the physician's duty to seasonably notify his patient of his intention to leave his practice is the same whether he is rendering services gratuitously or for money. The defendant attempted to introduce the fact that the services were gratuitous as a defense in a well known case arising in New York, (Becker vs.

Janinski, 15 N. Y. S., 675) but the court took the contrary view. The court says: "Here it is not shown that the plaintiff was no longer in need of medical attention so that the defendant had no right to discontinue his attendance, unless either the plaintiff consented, or he gave her proper notice; and, if he left her without such consent or such notice, he was guilty of grave professional negligence. The defendant swears that, at his last visit, he notified the plaintiff that he was going out of town, and indicated to her a physician who would attend her in his stead. If this statement be true, the defendant's absence is excused, and you must exonerate him from this imputation of neglect. The defendant's story is denied by the plaintiff's witnesses, and their testimony tends to prove that he abandoned her without leave and without notice. It is for you, gentlemen, to say what the fact is; and, according as you find the fact in favor of the plaintiff or of the defendant, your verdict on this question of negligence will be for the plaintiff or for the defendant."

"Independently of the defendant's wrongful abandonment of her, the plaintiff charges that during his three days' attendance upon her he treated her unskillfully. It is conceded that, when he ceased his visits to her, she had not been delivered of the "after birth" and that he was aware of the fact."

"It appears that the plaintiff was a charity patient; that the defendant was treating her gratuitously. But I charge you that this fact in no respect qualifies the liability of the defendant. Whether the patient be a pauper or a millionaire, whether she be treated gratuitously, or for reward, the physician owes her precisely the same measure of duty, and the same degree of skill and care. He may decline to respond to the call of a patient unable to compensate him; but if he undertakes the treatment of such a person he cannot defeat a suit for malpractice, nor mitigate a recovery against him, upon the principle that the skill and care required of a physician are proportioned to his expectation of pecuniary recompense. Such a rule would be of the most mischievous consequence; would make the health and lives of the indigent the sport of reckless experiment and cruel indifference. Even though, therefore, the defendant was not to be paid for his attendance, he was still bound in law to treat the plaintiff with requisite skill and requisite care."

When the courts lay down the rule that the physician's attendance need continue only so long as the patient's condition requires, they say in effect that the physician at his peril must determine whether or not the patient's condition is such as, in the opinion of physicians in similar localities of ordinary skill and diligence, would justify him in ceasing to give the patient further attention. As in other questions of medical treatment, the physician is not absolutely bound to arrive at the right result in coming to a conclusion on this matter, and is merely bound to exercise the best judgment of an ordinarily skillful physician. However, the mere fact that the patient accepts his opinion and assents to his ceasing his attention and fails to call other medical or surgical aid, is no defense to the doctor, in case he has not exercised the proper degree of skill and care in arriving at his judgment. This was held in the case of Carpenter vs. Blake, 75 N. Y. S., 12, where the court in effect says that the defendant by such action misrepresented his condition to the plaintiff and misled him to his injury.

To sum up the law on this subject, it would appear that while a physi-

cian is not bound to accept employment when called upon, yet if he does enter upon the employment without any express stipulations as to the nature or extent of his treatment, he is bound to continue his attendance until in the exercise of a properly skilled and educated judgment, he decides that the patient is no longer in need of medical attention, unless before that time, he is dismissed by the patient, or unless he discharges himself upon giving the patient a reasonable notice of his intention to cease his visits and thus allow the patient an opportunity to call in other medical or surgical assistance.

THE PHYSICIANS DEFENSE COMPANY IN MINNESOTA

Wins in its Appeal from Commissioner O'Brien's Ruling

Judge Kelly finds that "The Physicians Defense Company" is not amenable to the insurance laws of Minnesota. The title of the case is—The Physicians Defense Company vs. Thomas D. O'Brien, as insurance commissioner of the State of Minnesota. There was an agreed case before the court so that the status of the company might be determined with respect to the laws of insurance in Minnesota.

Judge Kelly says in his conclusions of law:

"The plaintiff corporation, with principal place of business at Fort Wayne, Ind., is not engaged in the insurance business, and the contract which the company proposes to use in this state does not in law constitute a contract of insurance, and the corporation, if it does business in Minnesota, under that form of contract, does not become and is not subject to the insurance laws of the state."

The court quotes from the statement of the company:

"The purpose of this association shall be to aid and protect the medical profession in the practice of medicine and surgery by the defense of physicians and surgeons against civil prosecutions for malpractice."

It will not be contended that a lawyer or a number of lawyers associated together, may not enter such contracts in precisely the language used by the Physicians Defense Company. And clearly such contracts, if made by lawyers, would be contracts for services. Then how does this contract become other than for services becuase a corporation makes it?

"It has been so ruled in other jurisdictions and appears to be sustained in reason."

Ed. Note—Although the ruling of the Insurance Commissioner, which by the above opinion has been over-ruled, did not interfere with the ability of the Physicians Defense Company to protect its contract holders, nevertheless, the decision was being misrepresented by the various insurance companies, and we therefore decided to take the matter up in the courts of Minnesota and show that we are as well well prepared to take care of our corporate interests as we are the interests of our contract holders.]

Medico-Legal Bulletin.

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 4 | **SEPTEMBER 1906** | NO. 8

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

One Dollar Per Annum

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FORTY-FIVE REASONS WHY

the protection offered by the Physicians Defense Company is the proper kind for the reputable practitioner.

BECAUSE, it is the only protection embracing the following features:

1. Unequivocally protects the holder for services rendered by a nurse, employee, associate physician, or any one for whom the holder could be held liable.

2. Contract agreeing to fight the case and plainly stating that it will not pay judgment, prevents the suit by showing that there is not one cent in sight for tribute.

3. Agrees not to compromise or settle the case. (Thereby jeopardizing the professional reputation of the contract holder.)

4. Protection prevents the damage-suit lawyer from taking the case upon a contingent fee basis. The prospective litigants, of course, will not put up the retainer fee, believing the lawyer would take the case on a contingency basis, if he had faith in the same; hence, no suit.

5. All publicity and annoyance prevented, by having the suit forestalled on its merits.

6. No common gossip about the doctor paying a sum to settle the suit, to be an incentive for some other blackmailer to try the same game.

7. Clearly agrees to fight the case through the court of last resort.

8. Gives the contract holder a voice in the selection of the local counsel, thus insuring an attorney who will be alert to the best interests of the contract holder.

9. Maintains an organized Legal Department with years of experience in handling such suits; having prevented thousands and successfully defended hundreds.

10. When a suit is brought against a physician holding an insurance policy agreeing to pay judgment, the jury are informed of the fact and assess a judgment against the physician, believing the corporation will have to pay the same, lose sight of the physician's professional reputation at issue in the case.

11. Only contract which unequivocally agrees to defend the suit in every instance to the court of last resort, and which makes no stipulation whereby it can withdraw its protection in case of suit.

12. Contract states specifically what it will and will not do.

13. Does not ask to be subrogated to the rights of the assured. When your premium is paid, there is no further obligation on the part of the contract holder.

14. Contract absolutely protects for services rendered during the period thereof, regardless of when suit is brought.

15. Protection must be complete, therefore the prevention and defense must be successful.

16. Maintains a skilled Legal Department; questions relative to procedure and practice will be answered free.

17. It refuses to pay judgment. (Thereby discouraging this class of blackmail.)

18. That will protect you for any alleged acts of your associates. (For which the law holds you responsible).

19. That protects you in the event of your leaving your patients in the care of another physician during your temporary absence.

20. That does not issue an application blank in the form of a warranty whereby your contract can be declared void in case of trouble.

21. Contract is not limited to "bodily injury," but covers every liability.

22. Experience is cumulative because it has a systematized organization absolutely unlimited in its scope, thus giving the practitioner in California advantage of experience gained in New York, and vice versa.

23. Has the one complete digest of the law relative to Civil Malpractice compiled by and for the Physicians Defense Company.

24. Prevention is the main thing, and the Physicians Defense Company has a deterrent force of 75 per cent.

25. Fighting ability is next, and the Company has established a 100 per cent record: 75 per cent of all threatened suits prevented, the remaining 25 per cent successfully defended.

26. Only protection that vindicates the diagnosis and treatment of the practitioner.

27. Only protection which protects the practitioner's greatest asset,—his good reputation.

28. Only organization with seven years of experience, being the originator of protection for the medical practitioner.

29. Only organization limiting its protection to the reputable.

30. Only plan which is prophylactic in its nature, and tends to eradicate the evil.

31. Only organization which places the physician in a class by himself, and furnishes protection in accordance therewith. The Physicians Defense Company does not place your risk with steam boilers, plate glass and burglary.

32. Only organization that guarantees to you your professional reputation.

33. Only organization you can safely support without contributing to the defense of the quack.

34. Incompetent practitioner competes with the competent by doing work at half pay. The Physicians Defense Company is the only organization that does not bolster up the quack by agreeing to pay for his mistakes.

35. Only organization engaged exclusively in the protection of the medical practitioner.

36. Only organization that offers aid to the physician before he is sued.

37. Has dealt honestly with each and every one of its contract holders.

38. Indirectly aids every reputable practitioner by its efforts in behalf of its contract holders.

39. Only organization operated along ethical lines.

40. Issues a bonded contract and guarantees a defense and money for the defense.

41. Only organization that places a reserve fund for each contract.

42. Only contract that completely protects the contract holder for services rendered during the period thereof, whether or not the contract is in force at the time of the threat or suit.

43. Publishes the Medico-Legal Bulletin, thus apprising the contract holder of late decisions relative to the Profession.

44. That inserts no clause in contract by which it can withdraw protection in case of suit.

45. That can write its contract in every State and Territory in these United States.

SUCCESS SYMPOSIUM

Here follows a few of the many communications commending the services and success of the Physicians Defense Company.

Inasmuch as we are industriously and honestly fulfilling each and every clause of our contract, it is very gratifying to receive an encouraging word from the contract holder.

COUNCIL BLUFFS, IOWA.—Enclosed find check for $15.00 in payment for another years' protection against blackmailers and dead beats.

I consider the $15.00 I paid you last year a very good investment for it saved me the annoyance and expense of having to defend myself against a fellow who belongs to the class above mentioned.

(Signed) W. P. HOMBACH.

CHICAGO, ILL.—In the suit against me, which was decided in my favor, I am glad to say that I was highly pleased by the conduct and management of the case, and highly gratified with the results.

(Signed) C. A. DAVID.

MALDEN, MASS.—I am well pleased with the manner in which you have handled this case and wish to thank you for the same. I am satisfied with the Physicians Defense Company and consider it the strongest bulwark that can be placed around a physician and his property.

(Signed) F. A. HODGDEN.

JOPLIN, MO.—You have showed us valuable services, and we cannot say too much in your favor in the way you handled the case for us.

(Signed) CHAS. A. MORSMAN, D.D. S.

FLINT, MICH.—Have been a policy holder in the Physicians Defense Company for the past two years, during which time I have enjoyed a sense of security as well as having a disagreeable complication averted.

The Company is "O. K." and no doctor can afford to be without it.

(Signed) J. C. MACGREGOR.

FORT WAYNE, IND.—Enclosed find check for Fifteen Dollars for payment of premium to July, 1907. Your protection seems to be very effectual, as it, or some other mysterious force has enabled me to have almost unbroken rest from the class of people from whom it protects.

(Signed) W. D. CALVIN.

DOWAGIAC, MICH.—Regarding the facts of my suit of malpractice brought against me, will say same was instituted because my contract with the Insurance Company formed, with its judgment-paying clause, an incentive thereto. Lost this suit because this fact was made known to the jury. The Company had reserved the right of settlement and settled against my judgment.

No physician can afford to have such a contract; it is dangerous. We need defense and not indemnity.

This settlement again formed the incentive for another action which I won with the help of the Physicians Defense Company's legal assistance, which they furnished me, although they were not bound to do so under their contract.

Your Company knows its business and I am exceedingly grateful for their help.

Shall always advocate your Company and its plans.

(Signed) G. R. HERKIMER.

NEW ORLEANS, LA.—I want to thank the Company very much for the way in which you handled the case.

I wish your Company evey success and I hope always to be a member of it.

(Signed) EDWARD S. HATCH.

BICKLETON, WASH.—The prospective litigants learned that I was a contract holder of the Physicians Defense Company, and they withdrew the suit, paying the costs of the same.

(Signed) P. C. WEST.

PERU, IND.—I am highly pleased with the manner in which the Physicians Defense Company handled the case brought against me, and feel that every physician in the country should carry a contract with them.

(Signed) B. H. GRISWOLD.

WEST UNION, IOWA—I wish to thank you for your promptness and kind assistance. The legal matter you sent my counsel will save him months of work.

(Signed) ALLEN G. RENNISON.

CHICAGO, ILL.—On the strength of your defense of the case of Dr. E. C. Morton, recently conducted, I am transferring my policy held in the———— Company, for four years.

(Signed) J. H. HESS.

PATRIOT, OHIO.—Enclosed find check for my renewal. While there are no menacing cases on hand at present, my past experience has been that it is well to be prepared for the same at all times.

(Signed) R. A. HOWELL.

IN HOSPITAL

(William Ernest Henley)

BEFORE

Behold me waiting—watiing for the knife.
A little while, and at a leap I storm
The thick, sweet mystery of chloroform,
The drunken dark, the little death-in-life.
The gods are good to me: I have no wife,
No innocent child, to think of as I near
The fateful minute; nothing all-too dear
Unmans me for my bout of passive strife.
Yet am I tremulous and a trifle sick,
And, face to face with chance, I shrink a little:
My hopes are strong, my will is something weak.
Here comes the basket? Thank you. I am ready.
But, gentlemen my porters, life is brittle:
You carry Caesar and his fortunes—steady!

OPERATION

You are carried in a basket,
Like a carcass from the shambles,
To the theatre, a cockpit
Where they stretch you on a table.

Then they bid you close your eyelids,
And they mask you with a napkin.
And the anaesthetic reaches
Hot and subtle through your being.

And you gasp and reel and shudder
In a rushing, swaying rapture,
While the voices at your elbow
Fade—receding—fainter—farther.

Lights about you shower and tumble,
And your blood seems crystallising—
Edged and vibrant, yet within you
Racked and hurried back and forward.

Then the lights grow fast and furious,
And you hear a noise of waters,
And you wrestle, blind and dizzy,
In an agony of effort,

Till a sudden lull accepts you,
And you sound an utter darkness,
And awaken—with a struggle—
On a hushed, attentive audience.

AFTER

Like as a flamelet blanketed in smoke,
So through the anaesthetic shows my life;
So flashes and so fades my thought, at strife
With the strong stupor that I heave and choke
And sicken at, it is so foully sweet.
Faces look strange from space—and disappear.
Far voices, sudden loud, offend my ear—
And hush as sudden. Then my senses fleet:
All were a blank, save for this dull, new pain
That grinds my leg and foot; and brokenly
Time and the place glimpse on to me again;
And, unsurprised, out of uncertainty,
I wake—relapsing—somewhat faint and fain,
To an immense, complacent dreamery.

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession

MALPRACTICE EVIDENCE SUFFICIENT TO SUSTAIN VERDICT—DAMAGES IN SUM OF $5,000 HELD REASONABLE

FROMAN VS. AYARS 85 PAC. 14 (WASH.) MARCH, 06.

This was an action against the defendant for malpractice.

The opinion of the court is as follows: "It is alleged that the plaintiff, while driving on the 7th of July, 1904, was thrown from a vehicle; that he sustained a compound fracture of the bones of his left leg, about two inches above the ankle joint; that the ends of the bones protruded through the flesh and skin; that within a few hours of the accident the defendant, at plaintiff's request, commenced to treat the broken leg and wound as a physician and surgeon, for hire; that in setting the bones, the defendant did not properly cleanse and prepare the wound made by the protrusion of the bones, but left foreign substances in and about the wound which should have been removed; that he caused the leg to be placed in a wooden box and fastened to the sides thereof by means of cord or bandages; that he placed a cord bandage around plaintiff's left foot just back of the toes, and drew the cord down over the end of the box, where it was securely fastened, and that this caused the foot to be extended into an unnatural position, making plaintiff suffer much pain; that the heel became sore and was injured, and that the leg was left in that condition from the 7th until the 10th of July, when it was taken from the box and placed in a plaster of paris cast; that it remained in the plaster of paris cast until July 17th, when it was removed therefrom and again placed in the box and securely bandaged and fastened; that by means of adhesive plaster or cords attached to the felt foot just back of the toes and extending downward over the iron rods of the bed, defendant caused a weight of about 18 pounds to be suspended; that the bandages and weight were so adjusted that the foot was drawn to an unnatural and improper position, the toes being drawn and held too solidly against the bottom of the box; that the leg remained in that position until July 18th with the weight so suspended, during which time plaintiff suffered great agony and pain, both with the wound of the leg and by reason of the condition in which the heel was held against the bottom of the box; that by reason of defendant's failure to properly cleanse and prepare the wound, the same within a few days after the injury became inflamed, pus formed therein, and the flesh in and about the wound began to decay; that for the same reason the ends of the bones became deadened and began to decay, and that this condition had so progressed that, on the 18th of July, the ends of the bones both above and below the fracture extending to the distance of

about one-half inch, and the flesh had so decayed that it was practically in an incurable condition; that at the time the leg was placed in the box and the weight attached thereto, the defendant packed bran around the leg in such a manner that the bran was permitted to accumulate in and about the wound; that by reason of defendant's failure to exercise reasonable care and diligence in the treatment of said wound and fracture, and by reason of his failure to exercise his skill and to apply his learning to accomplish the proper treatment, the aforesaid condition was produced, and that the same made necessary the amputation of the leg, which was effected on July 20th, 1904, at the Sacred Heart Hospital in Spokane, by Doctors Setters and Thomas. Issue was joined, and the cause was tried before a jury, resulting in a verdict for the plaintiff. Judgment was entered upon the verdict, and the defendant, having been denied a new trial, has appealed.

The first error assigned is that there was not sufficient evidence to warrant any verdict and judgment against appellant. As is usual in such cases, there was much conflict in the testimony of the physicians and surgeons who were examined as expert witnesses. Differing views were expressed as to the propriety of using the "fracture box" and suspended weight in such a case. There was general concurrence of view as to the necessity of applying antiseptic remedies and methods in the treatment of the wound from the beginning. But the testimony was not in accord as to the correctness of the remedies and methods applied in this case. There was testimony in support of the more material allegations of the complaint.

While it should not be said that all the averments hereinbefore set forth were sustained by testimony, yet the more material ones were. We think, without doubt, from the evidence that at the time respondent was removed to the hospital at Spokane, the condition of the wounds and bones was very serious. Witnesses testified that the appellant said, even at that time, that the patient was doing well. Dr. Setters, however, testified that when the respondent came under his treatment at the hospital, he found the wound very septic, and that it was filled with pus and bran; that the limb was in a fracture box filled with bran, and that there was a cloth across the opening of the wound about four by six inches in dimensions; that the end of the tibia was protruding through the wound, the flesh of the wound being dead, covered with narcotic membrane, and very foul; that amputation was then necessary, and that the same was accomplished. Whether such a result was due to the treatment administered by appellant and to his neglect to apply his learning and skill in the premises was, under the evidence, for the jury. In view of the character of the evidence that was before the jury, it is neither for the trial court nor for this court to weigh it, and say that it does not support a verdict for the respondent.

It is next urged that the amount of the verdict is excessive, and that it is manifest that the jurors were swayed by passion or prejudice. The amount is $5,000. Appellant's counsel makes an interesting argument to the effect that this case should be distinguished from one which is brought to recover for ordinary personal injuries where the injury is wholly due to the neglect of the defendant in the case. It is argued that in the case at bar the primary cause of the result which came to respondent was the running away of the team, for which appellant was in no way responsible, and

that the degree of appellant's responsible relation to the final outcome cannot be as great as that of one whose negligence laid the first foundation for the injury. The theory of the case, however, is that the final outcome to the respondent, by which he was deprived of a foot for the remainder of his life, would not have resulted if appellant had properly applied his learning and skill. It is true, respondent would have suffered pain and distress from the original injury, yet if the bones had properly united and the wound had healed, the suffering would have been but temporary, while as it is he must continue to suffer humiliation, inconvenience, and loss of earning power during the remainder of his life. If such a result would not have occurred but for appellant's neglect, we are not impressed that there is force in the logic of counsel's argument. Appellant held himself out as sufficiently skilled and learned to reasonably and properly treat respondent's injury, and having undertaken to do so for a compensation, the duty was placed upon him to bear upon such treatment the reasonable and ordinary skill and care recognized by the members of his profession in general, as proper and necessary in such a case. He was neither required to exercise the highest degree of skill nor the highest degree of care, but only such as are recognized as ordinary and reasonable by the standards of his profession. The issue was made before the jury that he did not do this, and that his failure in that regard was the responsible cause of the final and serious result to respondent. Respondent was 44 years old at the time of the trial, and it was admitted that his life expectancy at the time of his injury was 26 years. He had no settled occupation, but had before been variously employed at farming, in the livery business, and as a driver of teams. The value of his earning power should probably be viewed from the standpoint of a common laborer; but viewed from that standpoint, we think we should not undertake to say that the verdict was excessive. To pass through 26 years of life without a foot is a condition that we may assume, no man however humble his occupation, would be willing to accept for $5,000. There is seldom a case of this kind, or even one for ordinary personal injuries, when there does not seem to be some element of hardship either way the case may be decided; but such cases are triable by a jury and, when so tried, if there is reasonable evidence to support the verdict, it should not be reduced unless it is manifestly too large when all the facts and circumstances are considered. We cannot say that such is true of this one.

No errors are assigned upon the introduction of evidence, the instructions of the court, or other matters occurring at the trial.

The judgment is therefore affirmed.

MALPRACTICE—WANT OF SKILL OR CARE MUST BE DECIDED WITH REFERENCE TO LOCALITY OF PHYSICIAN

Dye vs. Corbin 53 S. E. (W. Va.) 147 March, 1906.

This was a suit for malpractice.

The opinion of the court is as follows: "On the 14th of January, 1903, in the circuit court of Ritchie County, T. E. Dye instituted an action of trespass on the case for $10,000 damages against M. L. Corbin, a practicing physician of that county, for malpractice in the diagnosis and treatment of an injured ankle. Upon trial before a jury, after the plaintiff had introduced all of his evidence, the defendant, without introducing any evidence, moved the court to exclude plain-

tiff's evidence, which motion being sustained, a verdict for defendant followed Plaintiff moved to set aside the verdict, which motion was overruled, and judgment entered for defendant. The proper exceptions to the ruling of the court being taken, plaintiff was allowed a writ of error by a judge of this court.

The assignments of error relate to, and are based upon, the action of the court in sustaining the motion to exclude plaintiff's evidence. The court should have sustained the motion to exclude plaintiff's evidence, if that evidence was insufficient to sustain a verdict in his favor. If it ever was the law that the court should not sustain a motion to exclude plaintiff's evidence, or to exclude plaintiff's evidence and direct a verdict for defendant, where there is only a scintilla of evidence to support plaintiff's case, it is no longer the law in this state. The test is not whether there is a scintilla of evidence to support the plaintiff's case, but whether the evidence will sustain a verdict in his favor. The plaintiff must show a prima facie case. This is the only reasonable rule. The utter futility of requiring a court to overrule a motion to exclude plaintiff's evidence where that evidence is insufficient to support a verdict, notwithstanding there is a scintilla of evidence supporting the plaintiff's case, is apparent Why compel the trial to proceed when in no event can the plaintiff finally recover? It is useless to continue a trial when there is nothing to try, and to compel a defense when there is nothing against which to defend. For these reasons, our later cases hold that a motion to exclude plaintiff's evidence should be sustained when that evidence is insufficient to support a verdict in his favor. Ketterman vs. Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683; Cobb vs. Glen Boom Lumber Co., 57 W. Va., 69 S. E. 1005; Williamson & Co. vs. Nigh et al. (decided at this term and not yet officially reported) 53 S. E. 124. This being the rule, was the evidence offered by the plaintiff sufficient to sustain a verdict in his favor?

Plaintiff offered evidence tending to prove, among other things, the following Plaintiff received an injury to his left ankle on the 31st of August, 1902, by being thrown from a horse about two miles from Ellenboro in Ritchie County. After receiving the injury, he was carried to the house of Mullenax, where a large number of persons gathered. The defendant, a practicing physician and the family physician of plaintiff, was sent for, and after some time came and examined the plaintiff's injury. At the time of the examination, the ankle was considerably swollen. The plaintiff said that he thought it was broken. The defendant after examination, said it was dislocated, but not broken. Plaintiff requested defendant to procure another physician, and to administer an anaesthetic. The defendant advised against the employment of another physician and did not administer an anaesthetic. He procured cotton and splints made from pasteboard, and bandaged the injured ankle. By his direction, persons present assisted him by holding the patient while the ankle was bandaged. After the plaintiff had been thus treated, he was carried to his home, a short distance. On the next day, the defendant visited the plaintiff and treated the injury. On the second day, the defendant treated the injury; the pasteboard splints being replaced by a tin splint or tin boot leg. The defendant continued the treaement until the sixth or seventh day after the injury, when he removed the tin splint and placed the limb in a cast made of plaster of pasis, after which he told the plaintiff that he might get out of bed and go wherever he

pleased. Some time after the cast was placed on the injured limb, plaintiff complained of pain. The defendantl being called, opened the cast by cutting a groove in it, again adjusted it to the limb, and put another cast over the old one. Between ten days and three weeks (the time is not shown with certainty) after the injury, plaintiff began to go about by the use of crutches. After he began to go about, he accidentally fell twice, but he claims without hurt to the injured ankle. About the 26th of September, 1902, he went to Parkersburg, some distance from his home, and about that time and afterward went to various other places, and did other acts which are claimed by defendant to constitute contributory negligence on the part of the plaintiff. In our view of the case, it is unnecessary to detail those acts claimed to show contributory negligence. About ten weeks after the cast was placed on the injured limb, plaintiff went to Parkersburg to consult a physician, and while waiting for the physician to return to his office plaintiff cut off the cast. When the cast was removed, the heel of the foot seemed to be turned inward, and the fore part of the foot had dropped downward. On the 6th of January, 1903, plaintiff went to Cincinnati, Ohio, for treatment by Drs. J. R. and S. H. Spencer, practicing physicians in that city. They made a number of radiographs of the injured limb, and found the following condition, as testified to by Dr. S. H. Spencer: "He had a fracture of the fibula of the left ankle joint. There was a dislocation. and in connection with this fracture and dislocation it threw the joint inward, and the foot turned inward. The dislocation was inward, and the foot turned inward, and the fibula was broken above the external malleolus, and the lower endof the bone was turned backwards; or, in other words, the head of the fibula was broken off and was turned backwards. There was an osseous deposit thrown out in and aroun the head of this bone, which had cemented, as it were, the foot and the ankle joint. Because of this anchylosis there was a stiffening of the ankle joint." After returning from Cincinnati, the plaintiff consulted Dr. Cunningham, of Marietta, Ohio, and was treated by him, which treatment resulted in the amputation of the foot about six or seven inches above the ankle. The amputation occurred on the 17th of October, 1904. For the present, we may eliminate from consideration the qnestion of contributory negligence, and first determine whether or not the plaintiff das made a prima facie case, excluding that question.

Plaintiff claims that the evidence in this case shows a liability on the defendant for failure to correctly diagnose the injury, and for failure to properly treat the injury. The declaration charges that the defendant, having accepted the employment of physician for the treaement of the plaintiff, "so unskillfully and negligently conducted himself in that behalf that, by his want of skill and care, the injury of the plaintiff became greatly increased and aggravated," etc. This essential averment must be sustained by proof. Before we can determine the sufficiency of the evidence to sustain this averment, we must ascertain the degree of skill and diligence which the law required of the defendant under the circumstances of this case. There was no special contract on the part of the defendant as to the result of his treatment. The employment was general. The defendant was simply called to treat the plaintiff's injury, and accepted the employment. Our previous cases, Kuhn vs. Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700, and Lawson vs. Conaway,

37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17, are in point. In the latter case, it was held that a physician is bound to bestow such reasonable and ordinary care and skill, and diligence as physicians and surgeons in the same general line of practice ordinarily have and exercise in like cases, time, and locality being taken into consideration; and that a physician is bound to exercise the average degree of skill possessed by the profession in such locality. This holding is in accord with the great weight of authority. We think it may be said to be the generally accepted doctrine that a physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury or disease, unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily possessed and exercised by the average of the members of the profession in good standing, in similar localities and in the same general line of practice, regard being had to the state of medical science at the time. 22 Am. & Enc. Law 799; Current Law, vol. 4, p. 638; 3 Wharton & Stille's Md. Juris. (5th Ed.) 475-475; Gramm vs. Boener, 56 Ind. 497; Whitesell vs. Hill (Iowa) 66 N. W. 894, Small vs. Howard, 128 Mass. 131, 35 Am. Rep. 363; Hathorne vs. Richmond, 48 Vt. 557; Pelky vs. Palmer, 109 Mich. 561, 67 N. W. 561; note to Gillette vs. Tucker, 93 Am. St. Rep. 657.

The general rule stated does not make the physician in any sense the warrantor or insurer of the success of his treatment, in the absence of special contract to that effect. Lawson vs. Conaway, supra; Kuhn vs. Brownfield supra; 22 Am. & Eng. Enc. Law, 800. The evidence of the Cincinanti physicians, S. H. and J. R. S., who made radiographs of the injured limb, was offered to show want of skill and diligence on the part of the defendant. Dr. S. H. S. testified as follows: "Q. Was this injury of the character that it could have been POSSIBLE, by proper medical skill, to have reduced it so as to have left the limb in a better condition than it was left in? A. Yes, sir; that was my judgment. Q. Suppose a patient had sustained an injury of the ankle joint, so as to have the fibula broken and turned backward, together with a dislocation of the ankle joint, in the manner and character as the one you have described; and suppose that the attending surgeon should undertake to reduce that fracture and dislocation without administering an anaesthetic to the patient, by having him held by physical force while he undertook to reduce the limb, and with no more effect than the one you have examined on the plaintiff; what is your judgment, as a physician and surgeon; would you consider this treatment good or bad? A. I would consider it bad treatment. Dr. J. R. S. testified as follows: "Q. Suppose an injury sustained by any one of the kind and character that you find by examination of Mr. Dye's ankle, and it was treated by the attending surgeon without the administration of an anaesthetic to the patient, and by causing him to be held during the manipulation by physical force, whether or not it would have been good treatment? A. I think it was not the proper way to proceed.

The foregoing is not all the evidence of the two physicians named, but the part quoted will serve to show the character of all of it. It must be borne in mind that these physicians did not see the plaintiff until more than four months after the injury. Neither the physician who was consulted by the plaintiff in

Parkersburg, nor the physician who amputated the foot, was called to testify for plaintiff. Taking the evidence of the Cincinnati physicians as true, and giving full force and effect to it and to every legitimate inference that may be drawn from it, we are unable to reach the conclusion that it shows such negligence or want of skill on the part of the defendant, considering the locality where and the circumstances under which the treatment was given, as would make the defendant liable. Of what standard of proper medical skill or bad treatment do these puysicians speak? As we have seen, the law does not in any case, without special contract, require the highest degree of skill and diligence possible. We are left to conjecture by what standard these physicians estimated proper medical skill or bad treatment. If these physicians meant the standard existing in Cincinnati, a large city, where they no doubt were familiar with the practice, then such standard fixes no liability on the defendant; because he was not bound by the standard prevailing in Cincinnati, but by the standard prevailing in the locality where the treatment was given, or in like localities. The evidence of these physicians seems to be directed particularly to the failure of the defendant to give an anaesthetic. It will be observed that these physicians do not say that the failure to give an anaesthetic produced a bad result on the injured ankle, or that the treatment of the ankle was improper. The treatment may have been attended with more pain to the patient because an anaesthetic was not administered, but the treatment of the ankle may have been the same, whether with or without an anaesthetic. It does not follow that the injury to the ankle was increased or aggravated by failure to give an anaesthetic. There is no evidence that the injury to the ankle was increased or aggravated by such failure. Such inceased or aggravated injury to the ankle cannot be presumed without evidence.

Again, it is not shown that, under the standard of skill and diligence by which the defendant was bound, it was his duty to administer an anaesthetic, considering time, locality, and the condition of the patient. The questions propounded to these physicians included none of these conditions which existed when the treatment was given by defendant. The answers, being responsive to the questions, cannot be taken to include more than the questions. This being true, we are left without any opinion from these physicians as to whether the treatment given by the defendant, under the conditions existing when it was given, was proper or improper. There is absolutely no evidence showing what the proper treatment for the injured ankle was, at the time and under the conditions existing when the defendant gave the treatment. To hold the defendant liable under the evidence of these physicians, would be to do so upon mere conjecture, without any satisfactory proof. Proof showing mere conjectural possibility that unfavorable results were due to want of care or skill is not sufficient to make a physician liable. 3 Wharton & Stille's Med. Juris. 517.

It may be claimed that the evidence of the plaintiff discloses failure of defendant's treatment to cure the injured ankle, and also discloses error or mistake in diagnosis. Failure on the part of a physician to effect a cure does not, alone, establish or raise a presumption of want of skill, or negligence, on his part. Lawson vs. Conaway, supra; 3 Wharton & Stille's Med. Juris. 517; Wohlert vs. Seibert, 23 Pa. Super. Ct. 213; Harre vs. Reese, 7 Phila. (Pa.) 138; Pettigrew vs.

Lewis, 46 Kas. 78, 26 Pac. 458; Barney vs. Pinkam, 29 Neb. 350, 45 N. W. 694, 26 Am. St. Rep. 389; Craig vs. Chambers, 17 Ohio St. 253; Sims vs. Parker, 41 Ill. App. 284. It has also been held that the fact that a physician fails to discover a fracture or dislocation does not, alone, establish or raise a presumption of want of care on his part. 3 Wharton & Stille's Med. Juris. 517; Richards vs. Willard, 176 Pa. 181, 35 Atl. 114; James vs. Crockett, 34 N. D. 540. Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment. A physician is liable for the result of error of judgment, where the error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess. 3 Wharton & Stille's Med. Juris. 501; West vs. Martin, 31 No. 375, 80 Am. Dec. 107; Johnson vs. Winston (Neb.) 94 N. W. 607; 22 Am. & Eng. Enc. Law, 805, and cases cited in note 1.

We find no evidence of gross error of judgment; no evidence as to what the proper treaement was under the conditions evisting when the defendant treated the plaintiff; no evidence that the treatment given was improper, considering time, locality, and conditions. We therefore hold that the plaintiff's evidence was inffisucient to sustain a verdict in his favor.

The judgment of the Circuit Court must be affirmed.

MALPRACTICE IN DENTISTRY—EVIDENCE SUFFICIENT TO TAKE CASE TO JURY

BATES vs. DR. KING CO. 77 N. E. (MASS.) MAY, 1906.

This was an action against a dentistry company for malpractice. A verdict for the defendant was rendered in the lower court, by the direction of the court. The exceptions of the plaintiff to this ruling were sustained in the Supreme Court.

The opinion of the court is as follows: "The evidence tended to show that the plaintiff was afflicted with syphilis; that it is a contagious disease; that, although the usual way in which it is communicated is by sexual intercourse, it can be communicated in other ways, as, for example, where a syphilitic sore on a hand or finger, or an instrument, or other object on which there is a syphilitic virus, comes in contact with a sore or cut on a person's body; that the dentist who operated on the plaintiff used a metal brush, and, in cleansing her teeth while using it, "he made three cuts, one on the left side of her mouth, one on the left side of her tongue, about an inch from the front of it, and one about the middle of her mouth at the junction of the lower lip and gum, these cuts causing considerable blood to flow;" and that two or three weeks afterwards syphilitic sores began to form at the points where the cuts were made. The evidence tended further to show that there was no sign of the disease upon her husband, and up to the time of this occurence she had been free from it. There was also evidence tending to show that if the brush or scraper used by the dentist had had any syphilitic virus upon it the disease might have been communicated to her; and, further that in some way connected with the operation upon her teeth the disease was communicated to her.

The evidence also showed that to prevent the inoculation of their patients it is the habit of dentists to disinfect by boiling water or otherwise their instruments, and there was testimony that the defendant was in the habit of using such means of disinfection. But the extent and thoroughness with which this was

done by the defendant was for the jury.

Without reciting further the evidence in detail, we are constrained to say that the questions whether the plaintiff was inoculated with the disease by means of contact with the implements used by the dentist in cleaning her teeth, and whether this result is attributable to the want of proper care on the part of the defendant as to the cleanliness of the implements, are upon the evidence questions for the jury.

Exceptions sustained.

STATUTE PROHIBITING PHYSICIANS FROM SOLICITING PATRONAGE THROUGH HIRED AGENTS HELD CONSTITUTIONAL

Thompson vs. VanLear 92 S. W. 773 (Ark.) Jan. 06.

In this case the plaintiff, VanLear, attempted to enjoin the defendants from further prosecution or interference with his business, by an act of the Arkansas legislature, physicians were forbidden to solicit patients by paid agents. The defendant and other physicians in Hot Springs had formed an association to suppress this practice, and had procured evidence against VanLear tending to show that he had been guilty of thus soliciting patients. On the hearing in the lower court, the chancellor held that the law prohibiting physicians from soliiting patronage through hired agents was unconstitutional and void.

Upon appeal, it was held by the supreme court that this law was a proper exercise of the police power by the legislature and was valid. The court says: "So as before stated, the main question is whether the state law is a valid law or not. Counsel for appellee has argued with much earnestness that laws of this kind are unwise, and he quotes from Herbert Spencer, who says in his Social Statics that there are no sound reasons why the principles of free trade should not be extended to medical advice and practice. The drift of the argument of Mr. Spencer can be understood from the following extract therefrom: "All measures which tend to put ignorance upon a par with wisdom inevitably check the growth of wisdom. Acts of parliament to save silly people from the evil which putting faith in empirics may entail on them do this, and are therefore bad. It is best to let the foolish man suffer the penalty of his foolishness. For the pain, he must bear it as he can; for the experience, he must treasure it up, and act more rationally in the future. To others, as well as himself, will his case be a warning. And by multiplication of such warnings there cannot fail to be generated a caution corresponding to the danger to be shunned." Social Statics, 205. There is no doubt some truth in the assertion that it is not best for the law to give too much aid, for people should be taught self-reliance. But this argument is one that should be addressed to the legislature, and not the courts. If followed to its logical end, it would result in allowing everyone to practice medicine who wished to do so, and that is in effect what the author contends should be done. But, however well that may sound as a theoretical proposition, it does not work well in actual practice if we judge by the statutes of the different states, for there is hardly a state in the Union that does not regulate the practice of medicine by requiring some showing of qualification before a license to practice is granted. The tendency is towards raising the standard for admission to practice rather than lowering it.

But, as before stated, those are questions for the legislature, and not for the courts. The legislature has acted in this

matter, and whether the law be wise or foolish, the courts must enforce it if it be valid. Whether or not it is a valid law is, as before stated, the only question we can consider. The learned chancellor, in a well written opinion held that it was not a valid law, for the rason that in his judgment it was an unwarranted interference with the rights of physicians; but we are not able to concur in this conclusion. Under its police power the state has the right to prohibit things that are hurtful to the comfort, safety and welfare of society. It is now well settled that in the exercise of this power the state may regulate the practice of medicine and surgery. Gosnell vs. State 52, Ark. 228, 12 S. W. 392; Richardson vs. State 47 Ark. 562, 2 S. W. 187; Dent. vs W. Va. 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; Hawker vs. New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L Ed. 1002; State vs. Edmundt (Iowa) 101 N. W. 431; Cooley's Const. Lim. 745; 22 Am. & Eng. Ency. Law (2nd Ed) 780. The law in question concerns the public health over which the police power has the fullest sway, for, health being the sine-qua-non of all personal enjoyment, it is not only the right, but the duty, of the state to pass such laws as may be necessary for the preservation of the health of the people. 22 Am. & Eng. Ency. Law (2nd Ed.) 922.

Counsel for plaintiffs quotes Oliver Wendall Holmes as saying that, "if the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes."

We do not dispute that statement, for there may be some truth in it, and it is possible that the legislature had something of the kind in mind when it passed this act. It may have thought that people are too much inclined to imagine themselves in ill health, too prone to consult doctors, and take medicine anyway, without being urged to do so without hired agents. If it is true, as the "eminenttmedical authority" quoted by counsel says, "that out of twenty-four serious cases of disease three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway." If this be true, is it not better as a rule to "throw physic to the dogs and let nature take her course." Now, it is probable that the conscientious physician would give that advice toihs patient in a case where he needed no medicine. But it is not likely that a physician would hire an agent to drum up patients for him, only to say to them; "Go thy way, thou dost not need a physician." A physician who has secured a patient by means of a hired agent has paid out a certain sum to secure his patient, and is under a strong temptation to put him through a course of treatment whether he needs it or not, in order to get his money back and make a profit on his investment. And therein lies the danger to the public of such a practice. When a physician obtains patients in that way, he in effect buys them, just as if he said to the agent, "I will pay you a certain sum of money for every patient you send me;" or, "will pay you a certain fee out of the money I receive from each patient you send me." Now, we do not think prudent people would wish to submt to the advice of a physician who had paid out money to get them under his treatment. To be successful, the agent would necessarily have to keep his interest in the transaction secret from the patient, and it can be easily seen that such a method of securing patients would very often result in imposition and fraud on the patient and in inducing many people to take treatment who did not need it.

As we have stated, even persons of good health are often too prone to imagine themselves in need of medicine. If it is unsafe to allow such persons to be solicited by hired agents to take what they do not need, how much worse is it to expose the sick to such influences. A man or woman who is laboring under a bodily disease is, other things being equal, more easily imposed on than one who possesses a sound mind in a sound body. The mind of the sick man, like his body, is in an abnormal condition. He is inclined to grasp at shadows and to pursue the wind, and is easily misled into paying money for medical treatment that he does not need. The man who is induced by an agent to buy goods of a merchant can see the goods and judge of their quality before paying his money; but the sick man must take the treatment for which he pays as a matter of faith. As to whether he will be benefited or not he can only conjecture. He can only judge of the value of the treatment to which he submits by its subsequent results, and not even then with any great degree of accuracy, for the causes which lead to health or disease are often obscure. They elude even the trained mind of the physician, and much more easily that of the patient.

The objections which we have stated to this method of securing patients, the temptations to which it would subject the physician and the dnger to which it would expose the patient, show a wide distinction between the case of a merchant who drums for custom by hired agents and that of a physician who seeks patronage in the same way. The business of the physician directly effects the public health, and it does not follow because the merchant, the manufacturer, and others may solicit trade through hired agents that a physician may do the same thing. The legislature has forbidden the physician to do so, and there are in our opinion sound reasons upon which to base the distinction. The law thus undertakes to protect the physician from the temptation and the patient from the danger to which they would be exposed by such a practice. When we consider how easy it would be in many cases for the professional drummer to impose on sick people, and even on those who are well, and induce them to submit tu treatment they do not need, when we consider that a physician who had paid for a patient would be under a strong temptation to make a profit out of his investment and to give and charge for treatment whether the patientneeded it or not, when we consider the fraud and imposition that would be encouraged by such a method of securing patients, we easily reach the conclusion that the law wisely prohibits a physician from seeking patronage by means of paid agents. It seems to us to be a regulation clearly within the power of the legislature to impose upon those who practice medicine, and that this statute is valid, at least to that extent. As we are under the opinion that the defendants were acting under a valid law, it follows that they were engaged in a lawful undertaking, and that there were no grounds for an injunction against them. It is therefore unnecessary for us to consider whether, if the law had been validin, an injunction should have been refused on the ground that there was an adequate remedy at law.

For the reasons stated, we are of the opinion that the chancellor erred in granting the injunction. Judgment reversed, with an order to dismiss the complaint for want of equity."

PRIVILEGED COMMUNICATIONS—AT WHAT TIME THE RELATIONSHIP OF PHYSICIAN AND PATIENT ARISES SO AS TO EXCLUDE COMMUNICATION BETWEEN THEM

Smoot vs. Kansas City, 92 S. W. 363, (Mo.) March, 1906.

Action for personal injuries.

The defendant attempted to introduce the testimony of one Dr. M., who had attended the plaintiff immediately after the accident. The court says at page 366: "This brings us to the consideration of the complaint by appellant of the exclusion of testimony by Dr. Monahan. Dr. M. was introduced b the defendant. He was assistant police surgeon of Kansas City, Mo. He stated that he was not on the city pay roll, but said: 'I handled the rich and poor alike; that is, those who could pay me, paid me, and those that could not pay me, I gave them the attention just the same.' He was working under the city police surgeon and rendered services to persons in cases of accidents, regardless as to whether or not he was to receive any pay from the person or not. Dr. M. went to the place of this accident and he saw the plaintiff sitting on the edge of the sidewalk. The error complained of is specially directed to the exclusion of the answer to this question: 'Q. I will ask you, doctor, if you saw the plaintiff spit any blood while on the sidewalk or in the street before getting into the ambulance on Brook street?' The action of the court in excluding the answer to the question, as above indicated, was doubtless predicated upon section 4659 Rev. St. 1899, which precludes any physician or surgeon from testifying concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon. The provisions of this section have frequently been invoked in the trial of causes in this state. The meaning, object, and purposes of this statute are nowhere better stated than in Gartside vs. Insurance Co., 76 Mo., loc. cit. 451, 43 Am. Rep. 765. It was there ruled that it was intended by the provisions of this statute to cast "the veil of privilege or secrecy over information acquired by a physician while professionally engaged in the sick chamber, and necessary to enable him to prescribe. Information acquired by a physician from inspection, examination, or observation of the person of the patient, after he has submitted himself to such examination, may as appropriately be said to be acquired from the patient as if th same information had been orally communicated by the patient." It was further stated by the learned judge writing the opinion in that case, that it was "doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz., his own diagnosis, of the case would be to restrict the operation of the statute to narrower limits than was ever intended by the legislature and virtually to overthrow it." Smart vs. Kansas City, 91 Mo. App. 536; Streeter vs. City of Breckenrideg. 23 Mo. App. 244.

It will be observed that under the rule above indicated, that in order to render observations and opinions acquired by a physician privileged that it must appear that the relation of physician and patient

must first be established. As was ruled in the Gartside case, that after a patient has submitted himself to an examination by the physician then information acquired by observation would be excluded on the same ground as direct communication by the patient to the physician. So far as the question propounded in this case is concerned, it does not appear as to whether or not the information desired from Dr. M. as to the spitting of blood, was from observation prior to any sort of examination of the plaintiff. It is clear that when Dr. M. first appeared upon the scene of the accident if he observed the plaintiff and that he was not at that time spitting blood, there is no reason why such testimony should be excluded, for that is prior to any submission by the patient to the examination of the physician, and so far as this records is concerned, as to that particular question, it nowhere appears that this was information from an observation by Dr. M. after he had commenced an examination of the patient. The question was simply as to whether or not he saw the plaintiff spitting any blood, while on the sidewalk or in the street, before getting into the ambulance on Brook street. The learned trial judge, when this witness was before him, very intelligently and clearly expressed his doubts upon the proposition. He said: "As to this evidence of the witness, Dr. M. if the witness was only asked to testify, and the purpose was only for him to testify, to what he saw, what he heard or learned from the patient on the sidewalk, or on the street, at the time he was picked up by the ambulance, it was done in a public place and in the presence of others, there would be a very serious question in my mind whether they would be entitled to protection and to entitled to be considered as confidential communications. However, I do not think that is the important testimony, and cannot be very important, because all of the evidence that has gone before shows that there was no special examination made, except the undoing of the shirt and feeling of the heart or place complained of, and then the patient was put in the ambulance and taken to the hospital, as I remember, either there or the station, where an examination was had and the patient treated. I am satisfied that that evidence would be absolutely incompetent. Anything that this physician learned at the hospital when he did make the examination, upon which he made his prescription and made his diagnosis, would be incompetent, would come within the rule laid down by the statute, that is, it is a privileged communication, and information that the physician is not allowed to disclose if the other party objects. As I say, the first part of it presents a very serious question in my mind. However, as that is not very important and is not the main point in this witness' testimony, I am going to exclude the entire testimony and hold that the witness is not competent to testify to anything that he learned from this witness whether by talking to him and asking him questions or by making an examination of the body." It is sufficient to say upon this proposition, that upon the retrial of the cause if it appears that the relation of physician and patient had been established and that the plaintiff had submitted himself for examination by Dr. M., that then any information acquired by observation after that time would be incompetent. But, on the other hand, if prior to the establishment of this relationship the doctor observed the patient and acquired information from such observation, we know of no rule of evidence that would make such information privileged.

STATE BOARD OF HEALTH ACTS IN A JUDICIAL CAPACITY IN REVOKING A LICENSE AND ITS ORDERS ARE REVIEWABLE BY THE COURTS

MUNK vs. FRINK, 106 N. W. 425, (NEB.) DEC. 1905.

This was an appeal from an order of the State Board of Health, revoking the license of Dr. Munk, on the ground of procuring an aborton.

The court says at page 426: "In support of the judgment below, it is contended that the state board is a body belonging to the executive department of the state governemnt for the exercise of pulery police functions and that its power, are exclusively executive and administrative and not judicial, in a sense, and that its judgments and orders are therefore not reviewable by the courts upon error, as provided in section 580 of the Code of Civil Procedure which confers upon district courts jurisdiction to review in that manner final orders of tribunals, boards, and officers, "exercising judicial functions." Reliance in support of this argument is mainly upon State vs. Hay, 45 Neb. 321, 322, 63 N. W. 821, and authorities there cited. But that decision does not appear to us to be in point, or rather, so far as it is in point it seems to us to countenance the opposite conclusion. The statute under consideration in that case provided that the superintendent of the Lincoln Hospital for the Insane should hold his office for the term of six years "unless sooner removed by the Governor for malfeasance in office, or other good and sufficient cause." The Governor preferred against the superintendent certain formal specific charges in writing, and after notice and a hearing, at which testimony was produced,made an order formally sustaining them, and removed the incumbent from office and appointed a successor. The former refused to yield and the Attorney General instituted in this court an original proceeding in the nature of an information quo warranto, for the purpose of obtaining a determination of the validity of the order of removal. It was held that the court would not, in that proceeding either inquire into the sufficiency of the evidence adduced before the Governor, or retry the issues themselves, but that the Governor was without jurisdiction or authority to remove, except for the cause of malfeasance in office, and that the court would examine the charges for the ascertaining whether they were such as, if true, justified the order under review. It was found that certain of them were too indefinite to sustain an order of removal, but that certain others were sufficient for that purpose and thereupon the court rendered a judgment of ouster against the incumbent, and in favor of the person appointed as his successor. Such being the jurisdiction and power of the court in a callateral action, that of the district court in a direct proceeding for review, can, as it seems to us, certainly not be less, and it follows from logical necessity that if the testimony taken before the tribunal, board or officer, has been authenticated and preserved in the form of a bill of exceptions, it may be reviewed in such a proceeding for the purpose of ascertaining whether it is sufficient to sustain the charges made, or some of them, and the consequent order of removal or revocation, as the case may be.

We quite agree with counsel for both parties that there is a close analogy between the class of cases to which the State vs. Hay, supra, belongs, and that in which the present case is included. An incumbent of an appointive statutory office has not necessarily a property or contractual right in his term, so as to

render his removal therefrom a judicial act. Neither has a licensee necessarily a property or contractual right in his privilege, so as to render a revocation of his license a like act, but we think that the legislature confers a quasi property or contractual right in either case by providing that removal or revocation, as the case may be, shall be only for specified cause or causes arising out of the conduct of the appointee or licensee and analogous to a forfeiture, the declaration of which is essentially a judicial act. This view does not, of course, involve a limitation of the power of the legislature to abolish the office or revoke the license by direct enactment. We conclude therefore that the district court erred in his order of dismissal and that his judgment should have been one either of affirmance or of reversal, accordingly as the law, applied to the record before him, required the one or the other. Counsel for plaintiff in error also attacks the act creating the state board of health, for unconstitutionality because it provdies for the payment of the secretares of the board by fees, which are not required to be accounted for to, and paid into, the state treasury. To what extent this method of compensation was a material inducement to the passage of the act may be a subject of debate, but in the light of State vs. Porter, (Neb.) 95 N. W. 771, we do not think it material. The state board is composed of executive state officers to whom the act awards, or attempts to award, no fees or compensation whatever, and even if it should be held that its provisions for the remuneration of the sercetaries is void, that fact would not necessarily be destructive of the board, for the compensation of whose assistants the legislature might enact some other means.

STATE BOARD OF HEALTH IS NOT A JUDICIAL BODY AND NEED NOT SUBPOENA WITNESSES CALLED BY A PHYSICIAN CITED TO APPEAR BEFORE IT

STATE VS. GODDIER, 93 S. W. 925 (Mo.) 1906.

This was a proceeding for a writ of prohibition against the defendant and others, the state board of health, from revoking the relators license to practice as a physician.

Charges of improper conduct had been preferred against him, and the state board of health had cited him to appear before them.

The relator alleged that he had requested the board to subpoena witnesses to appear before them, but that the board had refused to do this, and that he was unable to make a proper defense without the witnesses who refused to attend without a subpoena.

Held by the court that the board of health had authority to revoke his certificate provided the charges of misconduct were substantiated.

The court says at page 929: "The gravemen of the complaint in the petition is that the board is going to try him without exercising compulsory process to bring before it the witnesses he needs for his defense. The state board of health is not a court—is not a judicial tribunal. It can issue no writ. It can try no case—render no judgement. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the form or character of a judicial trial. The law does not contemplate that the technical rules of evidence applicable to a

judicial trial will be strictly followed, or that compulsory attendance of witnesses will be made. It contemplates that a plain, honest, common-sense investigation shall be made, with good faith and as thorough astmay be with the light of such evidence on either side as is obtain able without process and with the means at hand, much like the investigation that fair-minded, intelligent men would make in their own business concerning the alleged misconduct of one of their employes, with this difference only, that the board cannot revoke the license except for cause and after the accused has had an opportunity to be heard." In the case now before us for judgment we hold that the state board of health is not a judicial body; that it has the power to reyoqe a license or certificate issued by it if, after investigation, in which the licensee is afforded an opportunity to be heard, it is satisfied that he has been guilty of unprofessional or dishonorable conduct; and that, in conducting such investigation (or "trial," if that term is preferred), it is not assumin to exercise a judicial function. Therefore a writ ofprohibition does not lie to prevent the investigation. Writ denied.

THE INDIVIDUAL MEMBERS OF A STATE BOARD OF PHARMACY CANNOT BE HELD LIABLE FOR DAMAGES FOR A REFUSAL TO REGISTER AN APPLICANT

Monnier vs. Godbold, 40 So. 604 (La.) Feb., 1906.

This was a suit for damages against defendants as members of the state board of pharmacy for their refusal to register plaintiff as a pharmacist.

Held that a suit against the defendants as individuals would not lie. The court says at page 607: "The question of defendant's acts in this particular case rests back of the general rule upon a special state of facts. They were members of a state board, a body politic, upon which was thrown by the law, the duty of granting certificates to applicants. We are to inquire whether under the law, the members of the board are liable individually for the neglect of its duty by that body. In the American & English Encyclopaedia of Law, under the title referred to, it is laid down that if there is any neglect to exercise the powers or means, it is the neglect of the body, and not of the individuals composing it. Hydraulic Brick Press Co., vs. School District, 79 Mo. App. 665, and Bassett vs. Fish, 75 N. Y. 303, are cited in support to that position.

Under the statute of 1888, the board of phazmacy was created a body politic as a state agency. The duties required by the act to be performed are public duties, to be exercised for the interest of the public. The statute named the board as the entity which is to perform the duty, and not the living persons holding membership in it. The duties referred to are corporate, not individual duties.

In the case before us the act complained of was not one of commission, but of omission (a refusal to grant a certificate) and the action or non-action of the corporate body was one with which the defendants were connected exclusively in their positions as members of the board, Nothing which they did or could do, simply as individuals, could alter the situation. As individuals, they were strangers to the act complained of. The official action of the different members became merged in the ultimate action of the board itself as an entirety."

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THE ARCHER PRINTING COMPANY

FORT WAYNE, INDIANA

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MEDICO-LEGAL BULLETIN

VOL. 4 DECEMBER 1906 NO. 9

Leading Original Articles

THE MEDICAL PRACTITIONERS LEGAL LIABILITY FOR THE ACTS OF ASSOCIATES AND ASSISTANTS

In the practice of his profession the physician or surgeon comes in frequent contact with other persons whose business it is to assist him in the performance of professional duties. He may be associated with other physicians or assisted by medical students and nurses; he may find it necessary to leave his practice temporarily in the hands of other physicians; or he may deem it advisable to refer a patient to a specialist for particular treatment or for a more extended diagnosis. The question of how far he will find himself legally liable for the acts or omissions of such associates, and assistants, should be of considerable interest to the medical profession, and while the number of decisions by courts of last resort upon this subject is remarkably small, yet it may be of value to consider the principles involved in those few cases that have arisen.

It is a fundamental principle of the common law that a man is liable only for his own acts or omissions. An apparent exception to this principle is created by the maxim, adopted from the Roman law: "Qui facit per alium, facit per se;" but in contemplation of law this is not an exception; it is merely an affirmation that what a man may do himself, he may do through another, and it is his act whether he perform it with his own arm or with the arm of another. It is this maxim that lies at the foundation of that large branch of the law relating to the liability of the master for the wrongs of his servant. The rule of law on this subject is ordinarily stated as follows: A master is liable for all torts committed by his servant in the course of his employment and for the master's benefit."

This rule rests upon no well defined legal principles. It is evident that what a man directly commands another to do, he should answer for, but it is difficult to perceive why he should be liable for a tort which he neither commanded nor ratified. The explanation is probably to be found in the supposed public policy of making the master, about whose business the servant was, responsible for losses due to the servant's defaults, rather than cast the loss on innocent third parties. Whatever the reason, the law or the subject is settled as above stated.

The physician, of course, is not exempt from the operation of this general rule, and whenever the relationship of master and servant, in its legal sense, exists between him and some other person, he must expect to assume liability for that other's acts and omissions in the course of performing the duties incident to the relationship. However, before such liability can be fastened upon him, it must appear that the relationship of master and servant actually existed. By the term "servant" is ordinarily meant one who is employed by another and subject

to his orders. Thus, the relationship involves in the first place, a contractual obligation and the payment of a consideration by one person to another in return for the performance of operative or ministerial acts, and in the second place, the power to direct the method of performing such acts. When only one of these elements characterizes the relations between any two persons, you have a relationship which differs from the normal relationship of master and servant. Thus one person may have the right to call upon another to do certain work, but have no authority over the methods of performing the work, and the relationship between them will then be known as that of employer and independent contractor. Again the one may have authority over the other to direct how that other shall do certain work, but there is no contractual obligation between the two, and they sustain to one another the relationship of fellow servants, or at most of servant and vice-principal. In neither of these instances would one of these parties be responsible for the acts of the other, unles he had commanded or ratified such acts. In considering the question of a physician's liability for the acts of any of the persons who are associated with him in the performance of professional duties, it is necessary to bear in mind these principles of law.

It follows from these principles and from the nature of a partnership that a physician is liable for all the acts of his partner within the scope of the partnership business, for each partner is the agent of the other in carrying on the occupation or business, for the pursuit of which the partnership was formed. This was held in the case of Hyrne vs. Erwin, 23 S. C. 226. This was an action against the defendants for malpractice in treating the plaintiff's broken arm. The treatment was rendered by one of the partners only. The court said: "The rule of agency applies here as to the question of liability for negligence and want of skill. Each member of the firm guarantees that within the scope of the common business, reasonable care, diligence and skill shall be displayed by the one in charge, and a failure of one to exercise such care, diligence and skill is a failure of all; but, when the injury results from a wanton or willful act of one committed outside of the agency of the common business, he alone is liable." It has been further held in this connection that where one of two partners has been guilty of malpractice, and a suit is brought against the partnership, that such suit may be prosecuted to judgment against the surviving partner where, pending the action, the other partner has died. (Hess vs. Lowrey, 122 Ind. 225.)

Where a physician has an apprentice or student practicing under his direction, he would probably be held responsible for the negligence or unskillfulness of such an assistant. So far as I know, there is no decision to this effect in the United States, but the question has been decided by the English Courts in the affirmative. Moreover it was decided by a New York Court in the case of People vs. Monroe, 4 Wend. 200, that a physician was entitled to recover fees for the services of a student in his office, and that the statute prohibiting the recovery of fees by an unlicensed practitioner did not bar such a recovery. The logical sequence of this decision should be that a physician would be held liable for acts or omissions of the student.

The question of a physician's liability for the acts of nurses in charge of his patients is continually arising, and there appears to be considerable haziness in

the minds of the legal as well as of the medical profession upon this subject. The relationship sustained between the nurse and the patient, and between the nurse and the physician, differs so materially in different cases that it is difficult to lay down any general rule. As a preliminary observation it should be stated that it is not a part of the physician's usual duty to render his patient's services such as are ordinarily performed by a nurse. This was laid down in the case of Graham vs. Gautier, 21 Tex. 112, where the defendant, who was being sued by a physician for his fees for attendance upon the defendant's slaves, answered that ten slaves had died because of want of care. The Court said: "The houses in which the slaves were lodged were open, the weather was not good, they were not well provided with bedding and clothing, and were left in these out-houses mainly to themselves, apart from any white family to see that they were properly nursed and provided for (white family being sick at another place at the same time) it would have been rather a matter of astonishment if all these negroes had survived under such circumstances, with the best medical skill and professional attention. *The physician was not bound to nurse them and provide for them. It was his business to instruct others how to do it.*"

As said above, the question of the physician's liability may arise under various circumstances. The nurse may be engaged and paid by the patient without the physician having any voice in the matter; or the patient may request the doctor to recommend a nurse and to engage her services; or the physician may employ and pay the nurse himself. In all of these instances it is undoubtedly a part of the physician's duty to instruct the nurse in relation to the treatment which he has prescribed for the case, and he would undoubtedly be liable for injuries resulting from the acts of the nurse which he had expressly commanded or ratified. In none of these instances, however, except the last, would he be liable for the torts which he had neither commanded nor ratified, because in these instances it cannot be said the relationship of master and servant exists between him and the nurse. Rather they stand with reference to the patient in the position of fellow servants, and neither is responsible for the negligence of the other.

This question often arises where a patient goes to a hospital recommended by a physician, and is injured by the the nurses in the hospital. In such cases it has been expressly held that the doctor is not responsible. In the case of Baker vs. Wentworth, 29 N. E. 587 (Mass.), the physician brought action for his fees, and a counter-claim for malpractice was pleaded by the defendant. At the trial the plaintiff testified that defendant's wife came to him for medical treatment, and that he advised her to have an operation performed and to go to a certain hospital in Boston for the purpose. It appeared that the patient was injured through the negligence of the nurses in the hospital, and the plaintiff offered to show that he was not the proprietor or manager of the hospital. This testimony was admitted, and the Supreme Court held on appeal that it was properly admitted, because the plaintiff could not be chargeable with the negligence of the nurses, unless he sustained such a relationship to the hospital. The same decision was also reached by the English Courts in the case of Perionowsky vs. Freeman, 4 F. & F. 977. In this case, a person who had been a patient at a hospital sued the defendants for malpractice. It appeared from the evidence that the alleged maltreatment was in the

administration of a hot bath which the defendants had ordered, but which it was not part of their usual duty personally to direct or superintend, and at the actual administration of which they were not present. It was held that the plaintiff was not entitled to expect more than usual care at the hands of the defendants, and that if they were not personally aware of the alleged ill-treatment, they were not liable.

Where a physician regularly employs a nurse and keeps her at his office to assist him in the regular treatment which he renders his patients, a different rule would undoubtedly apply, and he would be responsible for her failure to exercise due care. Furthermore, where a physician maintains a private sanitarium or hospital, and expressly or impliedly agrees to furnish nurses to the inmates of such hospital, he would be subject to the usual rule of liability applied to private hospitals in general. This was held in the very recent case of Stanley vs. Shumpert et al. 41 Sou. Rep. 565, decided by the Supreme Court of Louisiana last June.

This was an action against Dr. S. as the proprietor of a private sanitarium. It appeared that the plaintiff had been admitted to the sanitarium as a patient under the charge of his regular physician. The physician prescribed a mild solution of alcohol to be administered by one of the nurses of the sanitarium. The nurse negligently applied pure alcohol instead of the solution, and the plaintiff claimed that as a result of this negligence he had lost his eyesight. It was held that the defendant was liable for the negligent act of the nurse. The Court says: "The proprietor of a drug store has been held liable for the mistake of his clerk. The general responsibility of a druggist and of his clerk is greater than are the duties of the nurse. None the less, the functions of the nurse are sufficiently important to render her and her employers liable in damages for inflicting pain negligently. This nurse was employed by the sanitarium and had charge of plaintiff's case in accordance with his contract of employment. She was acting for the sanitarium under the direction of plaintiff's physician. Her duty was to carry out the orders of this physician, and it was the duty of the sanitarium to see that she carried out the orders devolving upon her as a nurse. The physician could have had another nurse called in her place, but he had no right to discharge her. The management of the sanitarium had the right of control and of discharge.

We think that the plaintiff should recover something for the intense suffering, though momentary, which the negligent mistake occasioned."

The most interesting question that presents itself in this connection relates to the question of the liability of a physician for the acts of other physicians whom he recommends to his patients, or employs to attend upon them. Cases of this character often arise where a physician has left his practice temporarily in charge of one of his fellow practitioners, and, an injury resulting to the patient from the negligence of the latter, an attempt is made to hold the regular physician. This question has arisen under two sets of circumstances; first, where the physician has merely recommended his patients to consult another physician in his absence; second, where he has employed another physician to take charge of his office and attend to his practice. It has been uniformly held, that where the defendant merely recommends his patients to call upon a certain physician, he is not responsible for the acts or omissions of such physician, provided he used due care in selecting the

physician whom he recommends. A case in point is that of Hitchcock vs. Burgett, 38 Mich. 501. The defendant in this case was the surgeon for the Michigan Central Railroad. At the time the plaintiff was injured, the defendant was out of town. Previous to his leaving, he had stated to the officials of the Railroad that, if anything happened, Dr. S. would look after it for him. When the accident happened to the plaintiff, Dr. S. was summoned and attended upon the case. The Court says: "I can find no evidence tending to show that Dr. Hitchcock had, previous to the time plaintiff was injured, requested Dr. S. to attend to any such cases, or that Dr. S. had agreed so to do. Nor as the case stands should I consider such a request very material. It also appeared that on the third or fourth day after the injury, Dr. Hitchcock returned, and, being surgeon of the railroad, took charge of the case. That Dr. S. objected to leaving the case and the plaintiff also was averse to his leaving, but Stillwell turned the case over to Dr. Hitchcock 'upon an arrangement being made that they should remove the temporary dressings, and make a careful examination of the case, as soon as the swelling had abated so it could be done." This was fixed for the ninth day which was the time that the patient was removed to Detroit.

Counsel for the defendants requested the Court to charge the jury: "If the jury find that one of the defendants was guilty of negligence, that is, did not use ordinary skill and diligence in the treatment of the plaintiff, and that the other defendant was not guilty of such negligence, then the jury should acquit the defendant whom they find not guilty." This was refused, but the Court submitted the case to the jury upon the theory that if they found Hitchcock was Surgeon of the road, in whose employ plaintiff was at the time of the injury, and that as such surgeon it was his duty to attend upon the employees of the road when injured; that in his absence he had requested Dr. S. to attend any case on the road for him, and for that reason Stillwell was called, and the plaintiff suffered from the negligence or unskillful management of Stillwell, defendants would be jointly liable for the damages resulting from such negligence or want of skill; that with the employment of Stillwell by Hitchcock in the manner suggested by the Court, each would only be liable for his own acts.

The Supreme Court says: "This refusal to charge, and the charge as given, cannot under the evidence in this case, be sustained. We are of opinion that the bill of exceptions fails to set forth any evidence fairly tending to show an employment of Dr. S. by Dr. Hitchcock, or any such relationship existing between them, growing out of either Dr. Hitchcock's position as surgeon of the road and what he had said to the superintendent, or otherwise, under which he could properly be held liable for the negligence or unskillfulness of Dr. S. Taken at the best, the statement made by Dr. Hitchcock to the superintendent of the road, was but a mere recommendation in no way binding the company to call Dr. S., or the latter to respond if called upon. Dr. S. in treating the plaintiff was not acting for Dr. Hitchcock, but for the railroad company, and was afterwards paid for his services by the company. It was right and proper that the physician of the company when about to be absent for a few days should inform the company of his proposed absence and recommend some other person to take his place, should occasion require, until his return. This would be

equally true of a family physician about to go away for a short time. There would be nothing more natural or proper than for him, before going away, to give notice of the fact and recommend some suitable person to be called during his absence. Yet no one would think of considering the person so recommended, if called, as acting under the employment of the physician who recommended him. It is not claimed that there was any express agreement between Stillwell and Hitchcock under which the latter agreed to pay the former for any such services as he might be called upon to perform. And certainly the facts as appearing upon this record would not raise an implied promise. If Dr. S. was not, in his treatment of the plaintiff, acting under such relations with Dr. Hitchcock as would render the latter responsible for his negligence and want of skill, if there were any such, then we can see no evidence under which Dr. Hitchcock could be held responsible at all."

This result appears to be the only one possible under the facts, for the employment of a physician, recommended by another, undoubtedly constitutes an independent contract between the patient and the physician who has been recommended, and in no sense does the physician, who recommends another, occupy the relationship of a master to a servant.

The only decision bearing directly upon the question of the liability of a physician for the acts of one whom he has employed to attend upon his patients during his absence, is the case of Myers vs. Holborn, 58 N. J. L. 193. The principal facts which were proved at the trial of this case were as follows: The defendant, a practicing physician of the city of Bayonne, promised the plaintiff, who resided in that city, to attend his wife professionally during her confinement. A short time before that event took place, he left the city for a three days' vacation, having first visited the wife of the plaintiff and made an examination of her condition, from which he concluded, as he informed her, that his services would not be needed for a few days. Before his return, however, she was confined. The plaintiff, when his wife's travail came on, telephoned to the house of the defendant for him to come at once, and, in response to this message, one Dr. P. arrived, stating that Dr. Myers was out of town, and that he represented him, and proceeded to take charge of the case, and to deliver the plaintiff's wife of her child without any objection being made.

It was not suggested that his treatment of the wife was unskillful, but evidence was offered to show that, after the birth of the child, he improperly severed the umbilical cord so close to its body that it was impossible afterward to tie it, and that the child consequently died, in a short time, of umbilical hemorrhage. The shock caused by her child's death under these circumstances, it was testified, so affected the mother as to seriously injure her health, and render her an invalid for many months, thereby depriving the plaintiff of her services and companionship, and making it necessary for him to incur expenses which he would not otherwise have been called upon to meet; and this suit was brought to recover compensation for such loss of services and companionship, and for such expenses, on the theory that Dr. P. was the agent and representative in this matter of the defendant, and that, therefore, he was legally liable for these results of Dr. P.'s unskillfulness. The trial judge adopted this theory, advanced on behalf of the plaintiff, in his charge to the jury, and so instructed them.

Upon appeal, the Supreme Court says:

"In this, it seems to me, there was an error. Dr. P. and the defendant were, each of them, practicing physicians of this state, having no business connection with one another, except that Dr. P. was attending the patients of the latter while he was temporarily absent; even if it be admitted, therefore, that Dr. P. was employed by the defendant to attend upon the wife of the plaintiff, that fact did not render the defendant liable for his neglect or want of skill in the performance of this service, for an examination of the authorities will show that a party employing a person who follows a distinct and independent occupation of his own, is not responsible for the negligent or improper acts of the other. Laugher vs. Pointer, 5 Barn. & C. 547;Milligan vs. Wedge, 4 Perry & D. 714; De Forrest vs. Wright, 2 Mich. 368; Wood on Master and Servant, Sec. 311."

This decision brings up the very interesting question, as to whether a physician is liable for the negligence of another regularly practicing physician, even though such physician is employed and paid by him. It is a part of the law of Master and Servant, that not everyone who is performing operative or ministerial acts for another sustains to that other the relation of a servant to a master. A distinction is taken between a servant and an independent contractor. Where a person hires another to do certain work, retaining control of the servant during his work, he sustains to that other the relationship of a master. Where, however, work is done by one person for another, but no control is retained by the employer over the employee or his methods of work, and results only are looked for, the employee is known in the law as an "independent contractor," and the employer is not liable for the negligence of such an employee provided he used reasonable care in selecting a person who was competent to perform the work contracted for. The theory of this New Jersey decision would seem to be, that the physician, who is employed by another to take charge of his patients, sustains toward that other the position of an independent contractor. This, it is believed, accords with the custom and views of physicians and surgeons in general, and should represent the law. The physician who employs another does not ordinarily retain the right to control that other in his treatment of a case, and does not oversee the details of the work. He merely expects and demands that proper skill and care be displayed by the physician whom he has employed. However, the question as to whether this New Jersey decision will be followed by other courts is an open one. It undoubtedly follows the general principles of the law of agency, but there would be a strong tendency to hold, that the physician, who collects fees for another's services, should be held liable for that others' neglect. The case of Landon vs. Humphrey, 9 Conn. 209, would seem to take this view. In this instance a physician was sued for the negligence of his alleged agent in vaccinating the plaintiff. It was shown that the defendant agreed to vaccinate the inhabitants of a certain town, and that he had appointed Dr. S. as his agent to perform the vaccination. It was shown further that Dr. S. was a licensed physician and of good character in his profession. The trial court instructed the jury that if they were satisfied from all the evidence that Dr. S. was the agent of the defendant in vaccinating the plaintiff, that the defendant was responsible for his malpractice. This instruction was sustained on an appeal by the higher court.

It has also been held that where a

physician employs another who has not an independent or separate practice, but is under the direct supervision of his employer, that the employer is liable for the negligence of such an assistant. The case of Wilkins vs. Ferrell, 30 S. W. 450 (Tex.) was an action against a dentist for malpractice. It was alleged that the defendant had assistants and employees engaged in the work under him, and that one of them extracted a tooth for the plaintiff so negligently as to fracture plaintiff's jaw. The Court says: "Other assignments of error complain of the refusal of special charges, and the language of the main charge relating to the liability of the defendant for the act of another person in pulling the tooth. Under the issues as made by the pleadings and the evidence, the jury should have been told that the evidence showed without dispute that some person other than the defendant extracted plaintiff's tooth; and that, before the defendant could be held liable therefor, it must appear from the evidence that such other person was the employee of defendant, over whose action, in the premises defendant had dominion and control; or that defendant, being called upon to do the work, directed it to be done by such other person, under circumstances which would justify an ordinarily prudent and reasonable person in believing that such other person was aiding defendant in his professional work; or that defendant held out to the public that the other dentists in his office were his assistants, and that plaintiff, believing and relying upon such representations, presented himself at defendant's office to have his tooth extracted, and submitted himself to one of such dentists in defendant's office, relying upon the defendant and not upon the individual who extracted the tooth, as the responsible head of the business."

(Courtesy of System)

PHYSICIAN'S RECORD OF ATTENDANCE AND CHARGES

A CARD INDEX SYSTEM WHICH RECORDS ALL CHARGES AGAINST A PATIENT AND ACTS AS A PERMANENT HISTORY OF HIS CASE, AND AS A GUIDE FOR FUTURE CASES OF A SIMILAR NATURE.

By S. W. Hewetson, M. D.

Physicians are, as a rule, poor business men, and prefer to devote their spare moments to study, rather than to bookkeeping. The result is that the "doctor's bookkeeping" is too often considered a joke; his faulty methods, or rather lack of method result in a considerable loss annually; and finally, when he dies, his executors are to be congratulated if they collect twenty per cent of the amount which he is owed.

The system of bookkeeping described in this article is simple and complete. It consists of a record which can be made in a moment's time after each professional visit, and which shows the status of the case at any time, as well as constituting a permanent history of it when the treatment is ended.

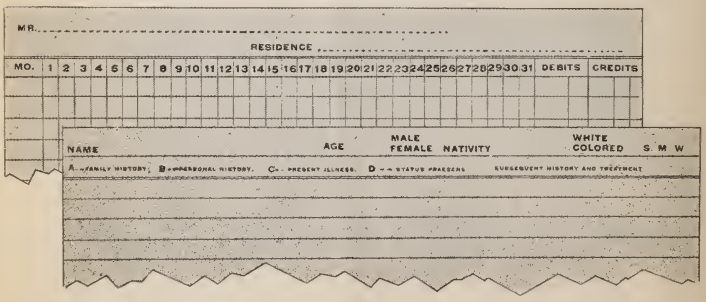
For the record of the case, an index card is used, headed with the name and residence of the patient. The card is divided into small squares, the horizontal lines referring to successive months and the perpendicular columns being numbered from 1 to 31 for each day's record (Form I.)

THE USE OF A CODE FOR ENTERING THE KIND OF SERVICE

Consultations, visits, operations, and charges are recorded on this card, a code being used for the purpose; for instance, "O" stands for office consultation, "V" for visit, "N" for night visit, "S" for operation, "D" for surgical dressing, "C" for confinement, and so on, to any extent that the user of the system sees fit.

The reverse side of the same card is ruled to receive a record of the patient's history and his illness (Form II.)

A 4x6 card may be used, but the 3x5 card is to be preferred, for one can carry it in a pocketbook until the case is termintaed.


MR.
RESIDENCE
MO. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 DEBITS CREDITS
NAME
AGE
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NATIVITY
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S M W
A.—FAMILY HISTORY; B.—PERSONAL HISTORY. C.—PRESENT ILLNESS. D.—STATUS PRAESENS
SUBSEQUENT HISTORY AND TREATMENT

Form I (upper card): Record of visits made by physician, on which the kind of service is entered. Form II (lower card): Reverse of same card, with space for history of case.

KEEPING THE RECORD OF EACH CASE FOR REFERENCE

When the case is closed the card is filed away in a drawer in an alphabetical index, and when the bill is sent to the patient, the card is transferred to a second drawer labeled "Accounts Rendered." Finally, when the account is settled the card is reversed and filed in a third drawer, labeled "History Records," where it can be used for reference on any future occasion, either in connection with the individual's past history, or for guidance in the treatment of similar cases.

ACCOUNTS PRINTED ON DUPLICATE BLANKS AND FILED

A duplicate prescription book is also used, and the number of each patient's prescriptions are entered on the card.

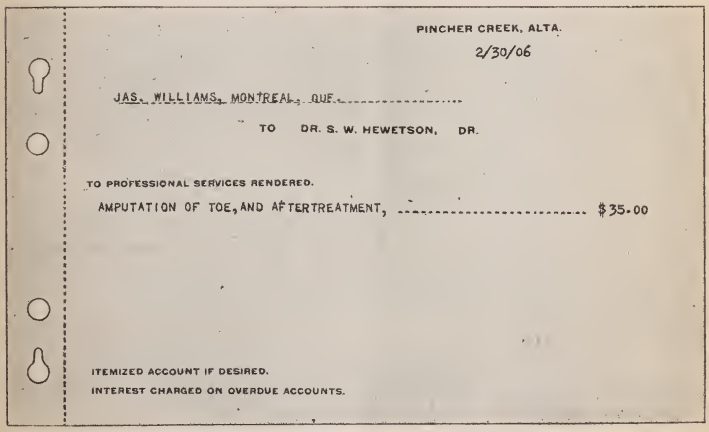
Accounts are made out in duplicate with the typewriter (Form 111), one copy being sent to the patient, and the other filed alphabetically in the loose-leaf ledger.

HOW TO PROFIT BY THE MISTAKES AND FAILURES OF THE PAST

By using this system, entries are made and accounts rendered in less than half the time required by the old methods, and as a result a physician has more time to devote to the medical problems which each case presents. Moreover, his books are not a hopeless jumble, intelligible to himself alone, and sometimes not even to him.

In a family practice, the importance of keeping case records cannot be overestimated, while in the treatment of new cases, reference to the history and prog ress, not to mention the mistakes or failures, in the treatment of similar cases in the past, is invaluable.

From a financial standpoint, it is safe to say that the use of this or some similar system will in six months' time, pay the cost of its installation, including the purchase of a typewriter.



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2/30/06

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TO DR. S. W. HEWETSON, DR.

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AMPUTATION OF TOE, AND AFTERTREATMENT, ---------- $35.00

ITEMIZED ACCOUNT IF DESIRED.
INTEREST CHARGED ON OVERDUE ACCOUNTS.

Form III: Typewritten statement of a patient's account, which is made out in duplicate, one copy being filed in a loose leaf ledger in the office.

Medico-Legal Bulletin.

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 4 DECEMBER 1906 No. 9

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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This is to certify that on January 23rd, 1905, I had been insured against mal-practice suits in the * & * Company for three years, and that I had held a contract with the Physicians Defense Company since the 1st of the month. On this date I operated on a case which subsequently threatened me with mal-practice suit.

I called upon the * & * Company for defense, sending them my summons, etc., which entitled me to twenty days for an answer. Within two days of the appointed time they returned my summons and refused to defend on the ground that I had not notified them in time, also I had done so the first time she threatened me with a suit nearly a year ago.

At this late date, the Physicians Defense Company took up the defense for me.

The * & * Company have cancelled their contract with me.

(Signed) W. SCOTT RENNER.

Nov. 26th, 1906.

TEN POINTS OF SUPERIORITY

THE ONLY COMPANY IN THE UNITED STATES

First That is organized solely for the purpose of protecting the MEDICAL PROFESSION against malicious attacks for malpractice.

Second THAT HAS NEVER FAILED TO GIVE ITS PATRONS A SQUARE DEAL. (See opposite page.)

Third That maintains a Legal Department that makes a specialty of knowing every law and supreme court decision in the United States that might have a bearing on this class of litigation.

Fourth That will NOT COMPROMISE (and thereby jeopardize your professional reputation.)

Fifth That guarantees to expend $10,000 in fighting through to the court of last resort **and thereby PROTECT your professional reputation.**

Sixth That refuses to pay judgments (thereby discouraging this class of blackmail.)

Seventh That will protect you for any alleged acts of your assistants (for which the laws hold you responsible.)

Eighth That protects you, in event of your leaving your patients in the care of another physician, during your temporary absence.

Ninth That can (and does) stop 75% of threatened suits before they attain publicity.

Tenth THAT CAN WRITE ITS CONTRACTS IN EVERY STATE AND TERRITORY IN THESE UNITED STATES.

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CHICAGO, ILL.—I wish to thank you for the efficient manner in which you took charge of the Fifty Thousand Dollar damage suit brought against me which resulted in my favor today.

October 7th, 1901, I took out my first contract with your Company, and have kept it in force to the present time. At the time, I had little thought that I would require the Company's services, but it came sooner than I expected. This past experience has convinced me more than ever that we as physicians should not be without protection.

(Signed) EDGAR J. GEORGE, M. D.

FORT WAYNE, IND.—You are as persistent in protecting the interests of your contract holders in case of suit, as you are in presenting your proposition to the profession.

I am convinced of this after your great fight in my behalf, wherein you contested the case against me two times through the courts and finally succeeded in having the same dismissed.

(Signed) WM. MCC. ENSLEN, M. D.

SIOUX RAPIDS, IA.—After delaying case through three terms of court on pleadings and motions, plaintiffs finally dismissed their case.

I. O. POND, M. D.
Per Attorney.

CHESTER, PA.—Enclosed please find check for renewal of contract. I take great pleasure in doing so, because I recognize how promptly and fully you met your promises in a recent case of mine.

(Signed) D. P. MADDUX, M. D.

BOSTON, MASS.—I desire to express my entire satisfaction and valued appreciation of the manner in which the suit was conducted.

I cannot speak too highly of the care and thoroughness of the preparation of the case and the masterly manner it was presented.

Two things in the Company appeal to me very strongly. First, the case will be fought to its bitter end without compromise. Compromise is admission of guilt. Second, the freedom of thought and worry of the defendant about the case before it comes to trial.

(Signed) FOREST E. MARION, M. D.

PONETO, IND.—To say that I am delighted with the way you have taken hold of this matter is but a mild expression of my satisfaction.

I extend to you my genuine thanks for the services rendered.

(Signed) S. A. SHOEMAKER, M. D.

CHICAGO, ILL.—We spent six days on motions and pleadings in this case, and finally succeeded in having the same dismissed.

VANDY F. MASILKO, M. D.
Per Attorney.

LINCOLN, NEB.—When case was called for trial I was present with witnesses, etc. The plaintiff's attorney was not there, and I refused to consent to postponement, adjournment or continuance. The Court dismissed the case.

M. H. EVERETT, M. D.
Per Attorney.

CHICAGO, ILL.—Case dismissed after various motions and pleadings.

WM. J. ARNOLD, M. D.,
F. J. HARRIS, M. D.,
Per Attorneys.

NEW YORK, N. Y.—After various motions and pleadings the two cases have been dismissed.

DANIEL LEWIS, M. D.,
Per Attorney.

OAKLAND, IA.—After various motions and pleadings, case dismissed.

RALPH G. SMITH, M. D.
Per Attorney.

CHICAGO, ILL.—After various motions and pleadings, case dismissed, and the same cannot now be re-instated.

L. D. MCMICHAEL, M. D.,
Per Attorney.

ST. PAUL, MINN.—We are pleased to state that the case has been dismissed after various motions and pleadings.

S. HESSELGRAVE, M. D.,
Per Attorney.

ANITA, IA.—Verdict for defendant after ten days' trial. H. E. CAMPBELL, M. D.,
Per Attorney.

NEW PHILADELPHIA, OHIO.—I have carried the * * policy, but find for the doctor's full protection under any and all conditions, the contract of the Physicians Defense Company is far and clear the better contract. Besides its being a Physicians Company, with the entire welfare of the doctor at heart, I don't think any reputable physician would carry any other if he knew the difference.

(Signed) R. S. BARTON, M. D.

OKLAHOMA CITY, OKLA.—I prize my contract with you next to my license.

(Signed) JOHN W. RILEY, M. D.

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession

MALPRACTICE—NECESSITY OF OBTAINING PARENT'S CONSENT TO OPERATION UPON A MINOR

BAKKER VS. WELSH ET AL. 108 N. W. 94 (MICH.) JULY 3, 1906.

Moore, J. Stephen Bakker died upon the operating table at a hospital in Grand Rapids, while defendant Apted was administering to him chloroform preparatory to the removal of a tumor by the defendant Welsh. The plaintiff is the father of the deceased, and, after being appointed administrator of the estate of deceased, brought this suit; his counsel stating upon the trial that his claim was under what is known by the lawyers and the courts as the "Death Act." The trial judge directed a verdict in favor of the defendants. The case is brought here by writ of error.

Stephen Bakker was 17 years old. He lived with his father on a farm. He was a large, healthy-appearing person. He had a tumor upon his left ear about the size of a dove's egg. Some time before his death he received treatment, and the tumor nearly disappeared; but prior to the middle of February, 1904, it reappeared, and he came to Grand Rapids to consult some physician about it. He had an aunt about 60 yeart old and two adult sisters living in Grand Rapdis, with whom he went to the office of the defendant Welsh, who was a specialist and had practiced medicine and surgery a long time. After an examination he was told it would be necessary to have a microscopic examination made to determine the character of the growth, and he was sent to Dr. Williams, another specialist, who made an incision and obtained a specimen from the tumor, and young Bakker returned to his father's. On the following Saturday or Sunday he again went to the office of Dr. Welsh, accompanied by at least one of his sisters, and was informed of the report made by Dr. Williams, and was told it would be best to have the tumor removed by a surgical operation at the hospital.

The testimony is somewhat conflicting as to what was said. The sister claims Stephen objected to taking an anaesthetic, and was told there was no danger. The doctor says that he told him there was always some danger in taking an anaesthetic, but that he advised him to have the operation performed. On Tuesday afternoon, Stephen, with his aunt and at least one sister, went again to the office of Dr. Welsh and was sent from there to the hospital, where they all understood an operation should be performed the following day. In the meantime Dr. Welsh had arranged with Dr. Apted, an expert in the administration of anaesthetics, to administer the chloroform. A careful examination of the heart and lungs of the young man was made. They appeared to be normal and in the presence of the hosiptal nurse and the doctors, with the usual appliances for

successful operations at hand, young Bakker was put upon the table. Dr. Apted began to administer chloroform by means of the mask and drop method, and had administered about one-third of an ounce, taking from seven to ten minutes in which to do it, and Dr. Welsh was just about to commence the operation, when suddenly the heart of the patient stopped beating. Every means known to the profession was used to revive the patient, but he was already dead. The record shows the father did not know an operation was to be performed. There were two counts in the declaration. Stripped of legal verbiage the first stated that Stephen Bakker was a minor and it was known to the defendant Welsh he was a minor, and that it was Dr. Welsh's duty to inform the father and get his consent before entering upon this operation. The second count charges what is known as malpractice or want of skill in the operation, and that young Bakker died by reason of an improper administration of an anaesthetic. The record, instead of disclosing want of skill in the operation shows quite the contrary. We have no hesitancy in saying the trial judge was right in so saying when he directed a verdict.

We then come to the question: Are defendants liable in this action because they engaged in this operation without obtaining the consent of the father? Counsel for the plaintiff are very frank with the court, and say in their brief: "We are unable to aid the court by reference to any decisions in point. We have devoted much time and research to this interesting question, but have been unable to find any decisions of a higher court either supporting or opposing the plaintiff's contention, and we will therefore have to be content by calling the Court's attention to such general reasoning as leads us to take the view herein contended for." They then argue at length and with a good deal of force that as the father is the natural guardian of the child and is entitled to his custody and his services, he cannot be deprived of them without his consent. We quote: "We contend that it is wrong in every sense, except in cases of emergency, for a physician and surgeon to enter upon a dangerous operation or, as in this case, the administration of an anaesthetic, conceded to be always accompanied with danger that death may result, without the knowledge and consent of the parent or guardian. It is against public policy and the sacred rights we have in our children that surgeons should take them in charge without our knowledge and send to us a corpse as the first notice or intimation of their relation to the case." On the part of defendants it is contended: (1) Consent of the father was unnecessary. (2) The lack of consent was not the cause of the boy's death, hence not actionable. (3) That if it were, the action does not survive under the death act. (4) That the action, if any, is in the father, not in the administrator. We do not think it necessary to a disposition of the case to decide all of the defenses interposed by the defendant. The record shows a young fellow almost grown into manhood, who has been a considerable period of time while living with his father, afflicted with a tumor. He has attempted, while at home, to have it removed by absorption. It does disappear, but after a time it reappears. He goes up to a large city, and with an aunt and two sisters, all adults, submits to examination, receives some advice, and goes back to his father with an agreement to return later to receive the report of the expert who is to make the microscopic examination. He returns accordingly, and with at

least some of his adult relatives arranges to have a surgical operation of a not very dangerous character performed. Preparations are made for its performance. There is nothing in the record to indicate that if the consent of the father had been asked, it would not have been freely given There is nothing in the record to indicate to the doctors, before entering upon the operation, that the father did not approve of his son's going with his aunt and adult sisters, and consulting a physician as to his ailment, and following his advice. We think it would be altogether too harsh a rule to say that under the circumstances disclosed by his record in a suit under the statute declared upon, the defendants should be held liable because they did not obtain the consent of the father to the administration of the anaesthetic.

Judgment is affirmed.

MALPRACTICE--TECHNICAL ASSAULT IN PERFORMING OPERATION WITHOUT CONSENT

Mohr vs. Williams. 108 N. W. 818 (Minn.) July ,1906.

Lewis J. Upon a former appeal of this case 104 N. W. 12 it was held (1) that in the absence of consent, express or implied, respondent had no authority to perform the operation on appellant's left ear. (2) That it did not conclusively appear from the evidence that such consent was conferred, either expressly or by implication. (3) That if the operation was performed without either express or implied authority, it was wrongfully and unlawfully done, in which case the amount of recoverable damages would depend upon the character and extent of the injury inflicted, considering the nature of the malady intended to be cured, the beneficial nature of the operation, and the good faith of respondent. The cause, being remanded was retried, resulting in a verdict for appellant in the sum of $3,500. Respondent made a motion for judgment notwithstanding the verdict, and if that was denied for an order granting a new trial upon the ground that the verdict was excessive, appearing to haye been given under the influence of passion and prejudice, not not justified by the evidence and contrary to law. The trial court did not pass upon the motion for a new trial, but granted the motion for judgment notwithstanding the verdict, which order was appealed from. The learned trial court apparently granted the motion upon the ground that the evidence conclusively proved that an emergency existed which called for immediate treatment, and that the operation was justified on that ground conceding no consent had been given, either expressly or by implication.

Respondent does not question the propositions of law determined on the previous appeal, but insists that the facts elicited at the last trial were more complete and explicit with reference to the condition of appellant's left ear, and demonstrate that he was justified in performing the operation as the only thing to do under the circumstances to relieve the patient from a critical situation. Appellant concedes that she cannot recover except upon the ground that no authority was granted, express or implied. From an examination of the record we are again of opinion that the evidence does not conclusively establish the fact that the left ear was in such a serious condition as to call for an immediate operation. If the patient placed herself in respondent's care for general ear treatment, why did he not in first instance make a thorough examination of the left, as well as the right, ear? is a pertinent inquiry. He testified that he

found an obstruction in the left ear, which, in itself was unnatural, and yet he did nothing to ascertain the real condition for nearly three weeks thereafter. If the critical condition discovered at the time of the operation was such as to be reasonably anticipated, then the long delay without attention or treatment is not readily explained, and is suggestive of inattention and negligence, and has some bearing upon the subsequent conduct of respondent and his explanation of what occurred. Dr. Davis was not present as the family physician with the right express or implied to consent for appellant to an operation on her left ear. The record discloses the fact that Dr. Davis was not appellant's physician, but had treated her sister, and was asked to be present at the operation simply to guard against the effects of the anaesthetic. There is no evidence in the record to justify the conclusion that Dr. Davis had any authority to consult with respondent and speak for the patient as to what might be necessary to do. We do not mean by this that the fact that he was consulted and expressed an opinion may not be given weight in determining the real condition of the left ear, and the good faith of Dr. Williams in operating but Dr. Davis did not qualify as an expert in that class of diseases, made no personal examination, and simply made the statement that, upon respondent's request to take hold of the probe and detect the presence of dead bone he did so and found it gave the impression of decayed bone in the ear. All the doctors who testified on behalf of respondent were called as experts, but only one qualified as such in diseases of the ear. Some of the witnesses were physicians and surgeons, but no specialists in this line of work, and others were general practitioners, but giving special attention to surgery. Inasmuch as the expert witnesses based their opinions mainly upon the testimony of respondent as to the condition found in the ear operated on, such evidence, as in all cases of expert testimony, was only entitled to such weight as the jury might give it, provided they found the essential facts upon which it was based to be true. In view of all the facts brought out at the trial, it was error to order judgment for respondent notwithstanding the verdict, but we are also of the opinion that he should have an opportunity to have his motion for a new trial passed upon by the trial court.

It is therefore ordered that the order appealed from be reversed with leave to respondent to apply to the court below for a new trial.

MALPRACTICE—LIABILITY OF PHYSICIAN OWNING PRIVATE SANITARIUM FOR NEGLIGENCE OF NURSE

STANLEY VS. SHUMPERT ET AL.; 41 S. REP. 565 (LA.) JUNE, 1906.

This was an action for malpractice.

Breaux, C. J. The action is one sounding in damages, which plaintiff in his petition fixes at $5,000.

In May, 1904, plaintiff called on Dr. Dowling, an oculist in the city of Shreveport, to have his eyes treated. The physician suggested that during the treatment he should stay at the Shreveport Sanitarium. His physician prescribed a mild solution to be applied under the direction of a trained nurse. On one of the early days in June of that year one of the nurses of the institution, owing to her carelessness, applied alcohol instead of the mild solution prescribed by the physician.

He avers that he suffered on that account excruciating pain, lost his eye-

sight, and that now he is entirely blind.

Defendants severed in their defense. Dr. Willis, in an exception, averred that at the time of the accident he was no longer in the Shreveport Sanitarium. Dr. S. also denied all connection with the institution. Dr. A., the other defendant, sets up as his defense that plaintiff had been under the treatment of Dr. D., and that he was admitted in the institution as his patient, and in consequence plaintiff's contract with the institution was exclusively for board and lodging, and for the services of a nurse to wait on him under the direction or supervision of his physician; that he had naught to do with the case; that he was exclusively under the treatment of his physician.

The foregoing is an abbreviated statement of the pleas and counter pleas of plaintiff and defendants.

The case was tried before a jury and decided for defendants. From the verdict and judgment plaintiff appeals.

The plaintiff is a farmer who resides in one of the parishes adjacent to Caddo. He repaired to Shreveport to have his eye treated by Dr. D. Many years ago he accidentally hit his right eye, from the effects of which it was at first diseased and afterward lost its sight entirely. In the year 1900 it was completely blind. He was advised by his physician before named to have his eye removed, for it would only be a question of time when it would cause the loss of the other eye, through sympathetic infection. The eye was not removed. Some time thereafter plaintiff again called on his physician, who found him suffering with ulcer on the cornea of the left eye. It was painful to him. He was exceedingly sensitive to the light. He dreaded it. He could see only a short distance—a few feet. It was at this time that the physician advised him to go to the sanitarium, where he would be better able to take care of his remaining eye, and where he might have it looked after regularly by nurses who would apply the remedies prescribed. He prescribed for him and gave the nurses directions as to what medicines to use; how, and the time to use them.

No other physician treated him. The nurse, under the physician's prescription, only had to drop some solution prepared for the purpose into the plaintiff's eye with an ordinary medicine dropper.

One of the nurses who happened to be in charge of plaintiff's ward undertook to administer the solution. She did not administer the mild solution prescribed. Instead, through negligence, she put the dropper into alcohol and dropped alcohol freely into plaintiff's eye.

The testimony shows that all the bottles were properly labeled. The alcohol caused intense pain, but did not destroy the sight.

When plaintiff testified it appears that he had no ulcer on the left eye. The physician also testified that he had no ulcer on the cornea, and that he could see somewhat better when he called on him and consulted him before accident.

Condition of plaintiff's eyes in 1904, before the accident:

"He suffered from ulceration of the cornea. The eye that he had lost and the remaining eye were greatly inflamed. His pain was excruciating. He could distinguish the fingers of the hand placed before him at about two feet. Ulcer was the cause."

Condition of plaintiff's eyes at the date of the trial;

"The ulcer on the cornea of his eye was cured. His eyes were not inflamed, nor were they painful to him. He could see and distinguish the fingers of his physicians' hand at a distance of about nine feet. There were spots on his eyes,

caused by sores, which very much impeded his vision."

The defense sets up that it was not possible to inject into the eye as much alcohol as plaintiff contends. The structure is such that alcohol or any other liquid is admitted in small quantity only. The testimony of witnesses described the cornea of the eye with some particularity. Its mechanism and composition, we will state, is in thickness, as they testified, about the thirty-second part of an inch, and has five layers.

Before closing the statement of facts, it is proper we should state that the testimony shows that an ulcer on the cornea is a diseased condition of the tissues and brings on suppuration, for which alcohol is sometimes prescribed as a remedy.

At the time that plaintiff's eye was examined by the physician, a few days before the accident, the iris of the eye had become involved.

It is also proper we should state as part of the statement of facts of the case that the testimony shows that alcohol is an antiseptic. It is in evidence that the proper application of alcohol consists in dipping the cotton on the applicator into the alcohol, shake it so that there will be no loose alcohol to fall on the tissues, which should not be touched. It is also in evidence that the application is not scientific which consists in pouring or injecting it into an eye with a medicine dropper.

We leave the statement of facts convinced that the nurse was not very careful, and that it was negligence on her part to apply, as she did, the alcohol, instead of the solution which was intended to ease and soothe the diseased eye.

In deciding, we take up the demand of plaintiff directed against Dr. Willis. The testimony shows that he is not liable. He was not at the time owner or lessee of the sanitarium. He never had charge of plaintiff's case. This ends the suit as to him.

We take up, in the next place, the case against Dr. S. We have seen that his defense was that he had leased the sanitarium to Dr. A., the other defendant, who, as lessee, was alone responsible for the management. The nurse had been employed while Dr. S. was in charge of the sanitarium, and the plaintiff had been received at the institution while he was the owner and in charge; but a few days thereafter, before the accident, he leased to Dr. A.

The lease went into effect on the 1st of June. It was after that time that the nurse committed the mistake

Plaintiff had no reason to be interested in the change from Dr. S. to Dr. A., lessee. No personal consideration entered into the case. Plaintiff had been admitted to the sanitarium to be treated by his own physician, and whether it was in charge of the one or the other was not a matter in which plaintiff was concerned.

There is a very similar case, viz.: Property had passed from one to another without recording evidence to the fact. The court held that the new owner was liable for the tort.

Plaintiff was not in any way concerned as to the party against whom to bring his action. Goodwin vs. Bodcaw Lumber Company, 109 La. 1050, 34 South 74.

Moreover, plaintiff's contract with the sanitarium was not for any limited time. He was a day patient of the institution, and remained there from day to day.

We do not think that plaintiff has a cause of action against Dr. S.

Defendants' next contention is that, even if the injury had been inflicted by the nurse, yet under the evidence defendant is not liable.

In support of this position, defendants

aver that they are not liable for the fault of the nurse; they were not present, and knew nothing of her mistake. In support of that position defendants invoke article 2320 of the Code, which reads as follows:

"Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

In the above cases responsibility only attaches when the masters or employers might have prevented the act which caused the damage and not have done it.

The Court has been called upon a number of times to interpret that article, and has never taken the restricted view that a defendant is liable only when present and when he could have prevented the act.

We are not inclined to take an extreme view upon the subject. We must say, however, that cases may arise of the master's liability, although not actually present.

It is a presumption that the employer exercises some influence over his employe's and that under that influence employers will not be prone to negligently injure others. That they, nurses, for instance, will show proper care of those placed in their charge, because of the duty to the employer, the performance of which it devolves upon the employer to require.

We can only cite here the different decisions upon the subject which are a complete answer to the contention of defendant; Hart. vs. Railroad Co., 1 Rob 178. Nelson vs. R. R. Co., 49 La Ann 491, 21 South 635; Anderson vs. Elder, 105 La 676, 30 South, 120; Evans vs. Lumber Co., 111 La 542, 35 South 736.

Defendant's next ground is that plaintiff was not injured by dropping alcohol in his eye.

A careful consideration of the testimony has not enabled us to find that plaintiff had been permanently injured. Not one of the number of physicians who testified, either for plaintiff or for defendant, said that there was probability that the alcohol had destroyed or injured plaintiff's eyesight. Plaintiff's eyesight is no weaker now than it was before the accident. He does not suffer with an ulcer. There are opaque spots on the cornea, but the testimony does not show that they were caused by the alcohol. True, he is nearly blind. His eyesight has always been weak. While specialists as witnesses did not approve of the manner the alcohol was administered to the eye, they said that the proper application of alcohol to the eye has no effect of an injurious character. Alcohol does not destroy when applied to an eye, even if it be sore.

We do not find that there was injury.

This brings us to the question of plaintiff's suffering.

The plaintiff did not suffer as much as one of the witnesses would have it, although he must have suffered pain for a moment. A nurse should exert her best endeavors to avoid mistakes of any kind, as they are sometimes attended in the sick room with the saddest consequences.

The only remaining question for decision is whether the sanitarium is liable for the pain caused by the mistake of the nurse, for unquestionably, as before stated, there was pain.

The proprietor of a drug store has been held liable for the mistake of his clerk. The general responsibility of a druggist and of his clerk is greater than are the duties of a nurse. Nonetheless, the functions of the nurse are sufficiently important to render her and her employers liable in damages for inflicting pain negligently. This nurse was em-

ployed by the sanitarium and had charge of plaintiff's case in accordance with his contract of employment. She was acting for the sanitarium under the direction of plaintiff's physician. Her duty was to carry out the orders of this physician, and it was the duty of the sanitarium to see that she carried out the orders devolving upon her as a nurse. The physician could have had another nurse called in her place, but he had no right to discharge her. The management of the sanitarium had the right of control and of discharge.

We think that the plaintiff should recover something for the intense suffering, though momentary, which the negligent mistake occasioned.

It is therefore ordered, adjudged, and decreed that the verdict and judgment are amended by conmedning the defendant, Dr. L. A. to pay $25,000 and as amended the judgment appealed from is affirmed, at defendant's and appellee's (A's) costs in both courts, except as relates to suit and appeal of Drs. S. and M., costs as to these to be paid by appellant.

MALPRACTICE—STOCKHOLDERS OF A CORPORATION ILLEGALLY PRACTICING DENTISTRY ARE LIABLE FOR THE MALPRACTICE OF EMPLOYEES

MANDEVILLE VS. COURTRIGHT 142 FED. 97. DEC. 1905.

This was a suit against the defendants who were engaged in the practice of dentistry under the name of the Alba Dentists Company. It appeared that some of the defendants had procured a charter from the State of New Jersey, but that this charter did not authorize the company to practice dentistry in Pennsylvania. The defendants were all stockholders of the company, and knew that it was practicing dentistry in Pennsylvania. It further appeared that one Lewis Soloman, who was an employee of the company, but had no license to practice dentistry, extracted a piece of the plaintiff's upper jaw bone, upon the erroneous supposition that it was a root or piece of process, the result being a badly broken jaw. The jury rendered a verdict in favor of the plaintiff for the sum of $4,000, whereof they required by order of special verdict that the sum of $1,500 was assessed as punitive damages. Held by the Court that the defendants were personally liable in spite of the incorporation of the company, and that negligence had been shown, and further that it was a proper case for exemplary damages. The Court says: "The plaintiff, in ignorance of the existance of such a corporation, and supposing that she was in the hands of licensed dentists, submitted herself to an authorized employe of the establishment, who operated upon her mouth so negligently and carelessly as to fracture her jaw bone and cause her serious injury. Such being the case, can the defendants escape personal liability to the plaintiff by setting up the charter of the company? We think not. To all intents and purposes, the defendants acted without any charter at all, for the New Jersey charter gave no warrant to the corporation to practice dentistry in Pennsylvania and the Pennsylvania statute prohibited the corporation to practice dentistry in that state. The defendants were bound to know that their corporation was forbidden by law to practice dentistry in Pennsylvania, and it seems to us that by the use of the name of the corporation

they could not avoid personal liability for what they did. The defendants were not innocent nonassenting stockholders, but they were concerned knowingly and actively in the conduct of an illegal business carried on in the name of the corporation. What was being carried on at their establishment, the practice of dentistry, the corporation could not conduct. This the defendants were bound to know. What, therefore, the corporation could not do, they could not, under the guise of its charter, carry on. And hence they must be conclusively held to have done themselves what was actually done. In a word, these defendants, in view of their knowledge and active participation, can not be heard to say that what they were causing to be done, was not being done by them but by their corporation, when that corporation could not conduct the business and they knew that it could not."

With reference to the matter of exemplary damages, the Court says: "The charge of the Court upon that branch of the case was unexceptionable and very fully and clearly stated the rules of law governing the subject. There was evidence that the operator upon the plaintiff's jaw was unlicensed as a dentist. The operation itself, called for experience, knowledge, and skill. These the person who operated seemed to have lacked. It was a great wrong to the plaintiff and a reckless indifference to her welfare to put her in the hands of such an incompetent person. Moreover, the evidence justified a finding by the jury that he acted with reckless disregard of the consequences to the plaintiff in extracting from her jaw what he supposed to be a root or piece of process, but what was, in fact, a portion of her jaw bone. We think that the facts disclosed by the evidence fully justified the jury in awarding to the plaintiff exemplary damages."

POWER OF BOARD TO REVOKE LICENSE OF PHYSICIAN ADVERTISING CURE OF VENEREAL DISEASES

KENNEDY VS. STATE BOARD OF REGISTRATION IN MEDICINE ET AL. 108 N. W. 730 (MICH.)

Carpenter, C. J. Complainant is a licensed physician and has been engaged in the practice of his profession in the city of Detroit in this state for several years. The individual defendants are the members of the state board of registration in medicine. That board was created by Act No. 237, p. 369, of the Public Acts of 1899. On the 30th of December, 1903, defendants notified complainant that he was "charged with having inserted or caused to be inserted under date of September 19, 1903, a certain advertisement in the Evening News, a newspaper printed and published in the city of Detroit, Wayne County, State of Michigan, a copy of said advertisement being hereto annexed, relative to venereal diseases, and containing matter of an obscene and offensive nature derogatory to good morals," and ordered him to show cause on January 21, 1904, at 3 P. M. "why this certificate of registration as a physician and surgeon * * * should not be revoked under and pursuant to subdivision 6 of Section 3, Act No. 237, p. 372, of the Public Acts of 1899, as amended by Act No. 191, p. 273, of the Public Acts of 1903." Complainant instituted this suit in chancery, charging that defendants are prejudiced and have prejudiced his case, and that Subdivision 6 of Section 3 of Act No. 191, p. 273, of the Public Acts of 1903 was unconstitutional, praying that defendants be enjoined from revoking his certificate. Defendants answered. The case was heard in the lower court upon testimony taken in open court and a decree therein entered dismissing com-

plainant's bill. From that decree complainant appeals to this court.

We agree with the learned trial judge—whose carefully prepared opinion is a part of the record in this case—that the testimony "adduced at the hearing utterly failed to sustain said first contention," viz., the contention that defendants are prejudiced against complainant and have prejudiced his case. The only question remaining for our consideration relates to the constitutionality of said subdivision 6 of Section 3. That subdivision reads: "The board of registration in medicine shall refuse to issue a certificate of registration provided for in this section to any person guilty of grossly unprofessional and dishonest conduct of a character likely to deceive the public, and said board shall, after due notice and hearing, revoke a certificate issued subsequent to the date of the passage of this act, or subsequent to the date of the passage of Act No. 237 of the Public Acts of 1899, for like cause or for offenses involving moral turpitude, habitual intemperance, the drug habit, or for fraud or perjury in connection with obtaining of a certificate of registration or for a certificate obtained or issued through error, when such offense shall have been legally established in a court of competent jurisdiction: And provided further, after the passage of this act, the board may at its discretion revoke the certificate of registration after due notice and hearing of any registered practitioner who inserts any advertisement in any newspaper, pamphlet, circular, or other written or printed paper, relative to venereal diseases or other matter of any obscene or offensive nature derogatory to good morals."

In support of his contention that this section is unconstitutional, complainant cites several cases. Matthews vs. Murphy (Ky.) 63 S. W. 785, 54 L. R. A. 415; Ex parte McNulty, 77 Cal. 164, 19 Pac. 239, 11 Am. St. Rep. 257; Hewitt vs. The Board of Medical Examiners (Cal. Sup.) 84 Pac. 39. The strongest and best reasoned of these cases is Matthews vs. Murphy. That case alone will receive consideration because the grounds upon which it is held inapplicable makes all the others inapplicable. In that case it was held that a statute giving the state board of health authority to revoke a certificate to practice medicine on proof that the holder was guilty of "grossly unprofessional conduct of a character likely to deceive or defraud the public" was unconstitutional upon the ground that the statute does not advise the physician "in advance what act or acts may be in violation of its provisions. * * * He might do an act which he regarded as entirely proper, which neither violated moral law nor involved turpitude, still such acts might, in the opinion of the state board of health, amount to unprofessional conduct, and which in its opinion did or was calculated to deceive or defraud the public. * * * The Legislature, in effect, has attempted to commit to the state board of health the right, after the physician has done some act, to determine what its effect is to be, and, if in its judgment he should be deprived of the right to practice his profession, it can inflict the punishment upon him by revoking his license." This reasoning presents no argument for declaring unconstitutional that part of Subdivision 6, under which defendants are proceeding to try complainant, viz., that giving them authority to revoke his certificate because he inserted an advertisement in a newspaper relative to venereal diseases. Indeed, in deciding Matthews vs. Murphn, the court recognize the constitutionality of such a law. This is shown by the

following quotation from its opinion, viz.: "If the Legislature desires to declare for what acts or conduct a physician's license to practice medicine shall be revoked it is competent to do so, and to vest in some tribunal authority to investigate and try the charge which may be made under such a statute."

Is the law which authorized defendants to revoke complainant's certificate on the ground that he inserted an advertisement in the neswpaper relative to venereal diseases unconstitutional? Complainant contends that it is and advances many reasons in support of that contention. It may fairly be said that all those reasons rest upon the assumption that the revocation of that certificate is an exercise of judicial power. All of complainant's objections to the constitutionality of the law are completely answered by saying that this assumption is unfounded. This is shown so clearly by the opinion of the Supreme Court of Minnesota in State vs. Board of Medical Examiners, 34 Minn. 389, 26 N. W. 123, that we make the argument in that opinion a part of this: "The radical fallacy in this chain of argument is the assumption that the revocation of such a license is the dexercise of judicial power. 'Due process of law,' or 'the law of the land' (which means the same thing), is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislative or executive, as well as the judicial, department of government. When it is declared that a person shall not be deprived of his property without 'due process of law' it means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. Cooley, Const. Lim. 356. This constitutional guaranty, which is as old as Magna Charta, as it is found in this or an equivalent form in every American Constitution, is intended to secure the citizen from the arbitrary exercise of the powers of government, unrestrained by the established principles of right and distributive justice. The validity of a statute which interferes with a man's enjoyment of his property is to be tested by those principles of civic and constitutional protection which have become established in our system of laws. Bank of Columbia vs. Okely, 4 Wheat. (U. S.) 235, 4 L. Ed. 559; Murray's Lessee vs. Hoboken Land Co., 18 How. (U. S.) 272, 15 L. Ed. 372; Davidson vs. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Cooley, Const. Lim. 355. "Taxation, in one sense, takes a man's property, yet it was never suggested that proceedings to enforce and collect a tax must be judicial. So, the exercise of the general police power of the state often materially interferes with or restricts a person's enjoyment of his property, yet it was never heard that, for that reason, it was the exercise of judicial power, or that, if not exercised by judicial proceedings in court, it was not 'due process of law,' or 'the law of the land.' It has never been held that the granting, or refusing to grant, such a license as this was the exercise of judicial power, and in fact this is not claimed in this case; and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is, in each case, identical, viz., to exclude an incompetent or unworthy person from this employment. Therefore the same body which may be vested with the power to grant, or refuse to grant a license, may also be vested with the power to revoke. The

statutes of all the states are full of enactments giving the power to revoke licenses of dealers, innkeepers, hackmen, draymen, pawnbrokers, auctioneers, pilots, engineers, and the like, to the same bodies boards, or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the police power, has often been sustained, and indeed, rarely questioned. Cooley, Const. Lim. 283 and 597, and cases cited." This doctrine is supported by other authorities. See Meffert vs. State Board of Medical Registration, 72 Pac. 247, 66 Kan. 710, 1 L. R. A. (N. S.) 811; State vs. Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212; Dent vs. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, and, so far as we have been able to discover, there is no authority against it.

Complainant insists that these cases are not authoritative because the statutes there upheld provided for "the right of appeal to a competent court * * * so that if any constitutional right has been invaded the act was merely preluminary and subject to correction in trial at court." As I understand this argument, it is contended that such statutes are unconstitutional unless they contain a provision for a review by a court of whatever the board of investigating tribunal is authorized to do, and if that contention were made it is answered by the reasoning quoted from the Minnesota case. The proposition upon which the argument rests is that a statute cannot deprive one of the right to seek redress in a court for the invasion of a constitutional right. This proposition is sound and receives our assent, and is not violated by the statute in question. If that statute is observed, it follows from what has already been said that no one will be deprived of a constitutional right, and in that case a provision for an appeal to a court is not essential. If through nonobservance of the statute, complainant or any other physician is deprived of a constitutional right, there is nothing therein which prevents his obtaining adequate redress in a court.

The decree dismissing the bill is affirmed.

SUIT FOR PERSONAL INJURIES IS NOT BARRED BY THE FACT THAT DAMAGES WERE AGGRAVATED BY MALPRACTICE OF ATTENDING PHYSICIAN

VIOU VS. LUMBER COMPANY, 108 N. W. 891 (MINN.)

This was an action against the Lumber Company for damages. It appeared that the plaintiff had settled a claim for damages arising from malpractice, aganist the physician who attended him.

The Court says that Page 893: "The defendant also insists that the damages were excessive and unjustified. The plaintiff's hip was dislocated and his back and legs hurt. He was given chloroform shortly after the accident, and his hip was set. The hip bone afterwards came out of the socket and was reset without the use of an anaesthetic. It subsequently again came out of the socket and was again reset without an anaesthetic. Extreme agony accompanied these operations. His injuries were permanent. At the time of trial he necessarily wore a steel brace running from his hip down to his shoe to support his leg. No question as to the propriety of the amount of the verdict would be reasonable were it not for this further contention of the defendant, namely, that the evidence showed a claim by plaintiff for damages against his attending physician for malpractice

in connection with the treatment of his hip injured by the accident here in issue and a settlement of that claim an indemnity insurance company for the physician by the payment of $242.50; that the evidence, in addition to this admission of malpractice, showed that plaintiff's condition at the time of trial and all damages flowing therefrom were not the result of the original accident, but of such malpractice; and that, upon the whole record, the trial court erroneously submitted the question of damages to the jury because plaintiff had not borne the burden of proof resting upon him to show the extent of damages for which the defendant was responsible, by reason of which the verdict of the jury could rest on nothing but vague guesswork and unreliable conjecture.

In point of fact, apart from the settlement of plaintiff's claim against the attending physician, the evidence not only does not conclusively show malpractice, but it does not much more than sufficiently present to the jury any issue on that subject. The expert called by the defendant, upon whose testimony he relies, in the aspect of the case, testified at one place that proper treatment of a simple dislocation of the hip, which he expressly assumed this to have been, would ordinarily result in a complete recovery within three months.

At another place, however, the same expert testified that "some cases of simple dislocation are never fully recovered." The assumption in this testimony that the present case was one of simple dislocation was based upon a difference of opinion between defendant's experts and the attending physician, who was in a much better position to determine the fact and whose views accorded much better with the history of the case. The record does not sustain the contention of defendant that plaintiff's injuries were due primarily to malpractice.

The mere fact that injuries caused by the negligence of the person sought to be charged have been increased by the negligence of an attending physician does not relieve that person of consequent liability. The defendant and the physician in such a case are not joint tortfeasors; there is concert neither in project nor in action between them. Each is individually liable. Their several liabilities do not prevent recovery from either or both although they may necessitate separate proceedings to enforce the injured person's right to sue. Indeed, there are authorities which hold that the injured person may recover from the negligent defendant the full amount of his actual damages, although they may have been aggravated by the malpractice of the physician whom he employed, and whose directions he followed in the exercise of due care. In view of the charge of the Court here, however, it is unnecessary to pass upon the correctness of this rule. For the Court regarded the settlement with the doctor, through the insurance company, as an admission of malpractice by the plaintiff, but not as a bar to his right to recover from the defendant such damages as were attributable to injuries resulting from defendant's negligencs only; that is, such damages only as were not due to the mistreatment of the physician. He charged the jury, inter alia, as follows: "The plaintiff having settled with his attending physician for alleged improper treatment he cannot recover of the defendant for any aggravation of damages caused by the doctor's improper treatment. The plaintiff can only recover such damages as naturally and proximately resulted from the defendant's negligence aside from any aggravation of damages caused by the negligence of the

attending physician. For any condition from which the plaintiff is now suffering and which is to be referred to improper treatment by this attending physician, he has received satisfaction and he cannot now recover of this defendant therefore."

The defendant has not just cause for complaint as to this charge. It is, upon the whole, favorable to it. Doubts have been resolved against the plaintiff; but he raises no objection. It is undoubtedly true that the plaintiff must affirmatively prove both the fact and the extent of his damages, but it has also been held that the defense of malpractice in such a case is an affirmative one and the burden of proof rests upon the defendant to show the amount of aggravation due to malpractice in reduction of damages. Plummer vs. City of Milan, 79 Mo. App. 439; Citizens' Street Ry. vs. Hobbs (Ind. App.) 43 N. E. 479; City vs. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253. In this case, however, it is not necessary to determine the soundness of this position; for defendant, without objection, fully assumed this burden of proof upon trial and in this motion for new trial in the court below and his assignments of error in this court, and is in no position to assert that the burden rested upon the plaintiff.

Nor is the verdict void because it rests on mere conjecture. The difficulty of eliminating from the aggregate damages that part which are due to the malpractice of the physician in admittedly great; but it is not greater than occurs, for example, in actions against joint tortfeasors. Nor is it greater than is involved in more nearly analogous cases of aggravated damages; as where plaintiff was guilty of negligence in failing to exercise due care in securing medical or surgical aid. (Louisville, etc., R. Co. vs. Falvey, 104 Ind. 409, 3 N. E. 389; 4 N. E. 908), or as where he has negligently failed to comply with the directions of his attending physician (Keyes vs. Cedar Falls, 107 Iowa, 509, 78 N. W. 227), or as where his own negligence generally has increased his damages (C. & E. R. R. Co. xs. Meech, 163 Ill. 305, 45 N. E. 290; Fullerton vs. Fordyce, 144 Mo. 519, 44 S. W. 1053; Plummer vs. City, 79 Mo. App. 439; Throckmorton vs. M. K. & T. Ry. Co., 14 Tex. Civ. App. 222, 39 S. W. 174), and see Strudgeon vs. Village, 107 Mich. 496, 65 N. W. 616. In all these cases cited there has been allowed recovery of damages of which the defendant was the proximate cause, excluding the aggravation of damages due to negligence of the plaintiff. It is inevitable that the determination of damages in all cases of personal injuries is indefinite and unsatisfactory. In no such case is a mathematical calculation possible. The matter must rest largely in the exercise of good judgment by the jury and of the sound discretion of the courts. The result is as close an approximation to justice as is permitted by our system of jurisprudence. The charge was within the spirit of the authorities cited and of the authorities on the general subject. Especially in view of the action of the trial court in reducing the verdict from $12,500 to $8,500, we conclude there was no error in the final award.

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HON. W. J. VESEY. Ex-Judge Superior Court.
WM. A. BOHN, Treasurer National Telephone Company.
E. W. COOK, Secy. Citizens Trust Co.
AARON ROTHSCHILD, Capitalist.
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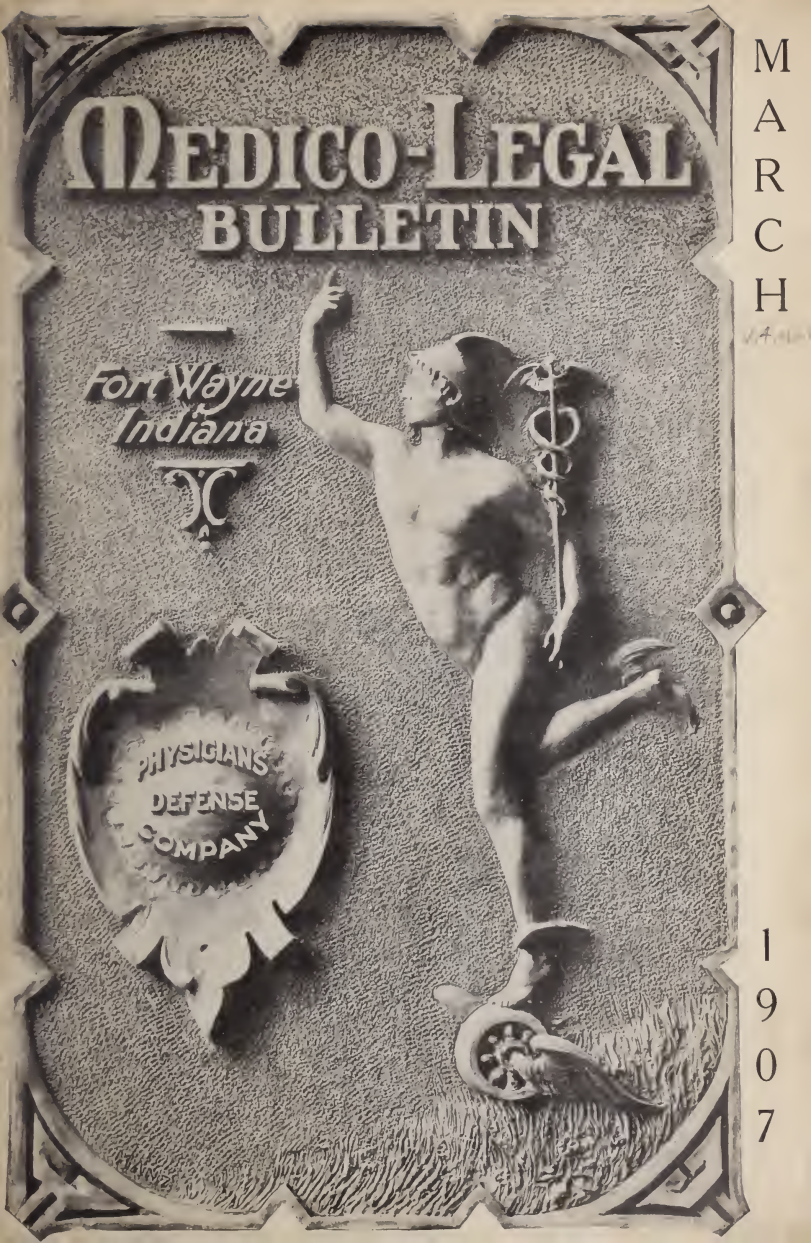
A Pyramid

MEDICO-LEGAL BULLETIN

Fort Wayne Indiana



MARCH

1907

There is no good arguing with a March wind.
Simply put on your overcoat.

Our contract, cheaper than an overcoat, is a protection in All Seasons.

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NUMBER

FORM K

CAPITAL STOCK, $100,000

Long Distance Telephones { BELL, 308 / HOME, 1338

FORT WAYNE, INDIANA

In Consideration *of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the* _____ *day of* _____ *of each year during the life of this contract,*

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ *of the City of* _____, *County of* _____, *State of* _____ *against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding* FIVE THOUSAND DOLLARS *in defense of any one suit, nor exceeding in the aggregate* TEN THOUSAND DOLLARS *in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—*

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Indiana, of any suit brought, or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, or copies thereof, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof, that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the above mentioned sums shall have been expended in said defense, providing, that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof.

Each consecutive full years' renewal of this contract shall add five per cent. (5%) of the principal sum to the amount for the defense of any one suit, and to the amount for the defense of any number of suits within one year, conformably with the table of accumulations endorsed hereon, but, such addition shall never exceed fifty per cent. (50%) of the aforesaid principal sums.

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Indiana, or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which annual consideration shall be paid.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190____.

(SEAL)

Miles G. Porter M. D.
President

_____
Secretary

I HEREBY APPLY TO THE

No._____

PHYSICIANS DEFENSE COMPANY

(Hereinafter known as Company)

FORT WAYNE, INDIANA

$15.00

For a DEFENSE CONTRACT FOR MEDICAL AND SURGICAL SERVICES, and agree that said contract shall be based upon the following statement of facts:

My full name is..... Office No.....Street

City of.....County of.....State of.....

If connected with a firm, the style is.....

I graduated from the..... in the year.....

I practice under the..... School of Medicine, and have been duly Registered and Licensed to practice in this County, and under the laws of this State, and am a member in good standing in the .....

.....

I do not own or maintain a hospital or sanitarium, except as follows:

Name..... No. of beds.....

I agree that this Contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph when demand is made or suit commenced for damages, and to immediately forward by mail any summons served, copy of the complaint filed, a history of the case and of the services rendered as per instructions from the Home Office, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance, not pecuniary, in defense of the case, without charge to the Company.

Date.....190.... Applicant's Signature.....

MEDICO-LEGAL BULLETIN

VOL. 4 MARCH 1907 No. 10

Leading Original Articles

STATUTES OF LIMITATIONS AS AFFECTING ACTIONS FOR MALPRACTICE.

Under the English Common Law an action might be brought at any time after the right accrued. As society became more complex and litigation grew in volume and variety, so many inconveniences and evils resulted from this condition of the law, that in the time of Henry VIII a statute was passed which sought to limit the time within which an action might be brought. However, the first real statute of limitations, in the modern sense of the term, was enacted in 1623 during the reign of James I. This statute was in effect in England at the date of the Revolution, and has been adopted by most of the states with certain considerable modifications.

At the present time the periods prescribed by the statutes of the different states for the bringing of a suit for malpractice vary from one to six years. Only four states have statutes which apply expressly to malpractice actions, these four being Michigan, North Dakota, New York and Ohio. In the other states the malpractice action is governed by one of two sections of the General Statute of Limitations, either by the section governing the commencement of suits upon implied contract or by the section governing the commencement of suits for personal injuries. In the majority of the states the limit of time within which a malpractice action can be brought in the form of a tort action or action for personal injuries is two years, and the limit of time within which it can be brought in the form of an action for a breach of contract is six years. However, in some eight states the limit is one year, and in ten other states it is three years. While it thus appears that the limitations vary considerably in the different states, yet their are certain broad resemblances between the statutes, and they are construed and applied according to certain general principles that have grown up and been followed ever since the enactment of the statute of James I referred to above. The statute of Indiana will do as well as any other to illustrate the ordinary form and wording of a Statute of Limitations, and the sections which govern the subject of malpractice are as follows:

"The following actions shall be commenced within the periods herein prescribed ,after the cause of action has accrued, and not afterwards:

(1.) For an injury to person or character—within two years.

(2.) On accounts and contracts not in writing within six years."

Certain exceptions ,which prevent or suspend the operation of the different statutes, have been created either by express legislative action or by judicial decision in all of the states. The most common among the exceptions created by statute are, the absence of the defendant from the state, and the infancy, or

the insanity, or the imprisonment of the plaintiff. In most of the states it is made a part of the statute of limitations, that where any one of these conditions exists, the statute shall not commence to run against the person, in whose favor the right exists, until after such condition is removed. The exceptions which the courts have read into the statutes of limitations rest upon the doctrine of necessity, and are strictly limited. Among them may be mentioned instances where the plaintiff is prohibited from bringing suit by some paramount authority, as by an injunction from a court, or where, by express statute, the executor or administrator of a decedent is exempt from suit for a certain period, or where the existence of a state of war prevents the plaintiff from bringing or prosecuting his suit. Another exception which is generally implied by the courts is in the case of fraudulent concealment by the defendant whereby the plaintiff is prevented from learning that he has a right of action.

The reasons which lie at the foundation of statutes of limitation and which lead to their enactment are three in number. In the first place it is the part of public policy to put an end to litigation, for as one authority has said, "Dominion of things must not for a long time remain uncertain so as to disturb the peace of society by giving rise to innumerable and perpetual litigations." In the next place the lapse of time tends to destroy, or at least render more difficult to procure, the evidence by which a defendant might establish his defense, and in the third place a strong presumption is created from the very fact of forbearance in him who has delayed to bring his suit that the claim is unfounded or at least extremely doubtful. At an early date the courts did not give the considerations which led to the establishment of these periods of limitations, the weight that should have been accorded them, but were inclined to construe the statutes strictly against the party relying upon them, and to limit their operation so far as possible. During the last century, however, the Courts have changed their attitude on this subject and have adopted a more liberal rule of construction, and have looked with favor upon the statutes as tending to the stability and repose of society and as preventing the enforcement of stale and fraudulent claims. "A statute of limitations (says Mr. Justice Story) instead of being viewed in an unfavorable light as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended emphatically to be, a statute of repose." Pursuant to this general trend of opinion, the courts are slower than formerly to engraft exceptions upon the statute, and are inclined to hold that they should not depart from the plain and literal expression of the statute.

Malpractice partakes of a dual nature in that it is at the same time the breach of a contract and the violation of the physician's common law obligation to do or not to do certain acts. Accordingly an action for malpractice may be either an action in contract or an action in tort and it is for this reason that, in the absence of a statute expressly referring to malpractice actions, it is necessary to refer to the statute limiting actions upon contracts, as well as to the statute limiting actions for injury to the person. In some states as in Iowa, the statute limiting actions for the injury to the person, expressly covers all such actions whether they arise from breach of contract or otherwise. Where this is not the case, however, it is impossible to determine whether or not a certain suit is barred, until the complaint

or petition filled in the suit has been examined, and the nature of the action, whether in contract or in tort, has been determined. Since in most states there is now no set form of pleading, and the nature of the complaint must be gathered from its substance and general tenor, it is often difficult to decide whether or not the suit is on the contract or for breach of the physician's common law obligation. An example is found in the case of Staley vs. Jameson 46 Ind. 159. In this case the plaintiff alleged that he employed the defendant physicians to set and heal his arm and for that purpose they undertook as surgeons for the sum of one hundred dollars, paid them by the plaintiff, to attend and care for him; that they so negligently and unskillfully conducted themselves in setting and attempting to heal and cure said arm as to impair and destroy the efficiency of and render the same almost worthless to the plaintiff; that by reason of such negligence the plaintiff was disabled and put to great expense to his damage." The defendants answered that inasmuch as the cause of action described in the complaint did not accrue within two years before the commencement of the action, that it was barred by the statute of limitations. The plaintiff contended that the complaint stated a cause of action for breach of contract, and accordingly was governed by the six years statute of limitations. The court held that this was an action upon the contract, basing its conclusion largely upon the fact that the plaintiff used the word "Undertook" and alleged the payment of a consideration. In most of the malpractice actions that are brought, it is the intention of the plaintiff's attorney to base his complaint upon the defendants breach of his common law obligation, in other words to make a complaint sounding only in tort. However, as it is usual to mention and describe with some fullness the contractual nature of the services performed by the doctor, it is often quite difficult to determine whether the contract is mentioned merely for the purpose of explaining how the patient happened to submit himself to the defendant's care, or whether it is set out as the basis of the plaintiff's right to recover.

Having ascertained the nature of the pleadings, the next question to decide in any case in which the statute of limitations is involved, is the question as to when the statute began to run against the right of action. To decide this question it is necessary to determine when the right of action accrued, for, except where one of the exceptions above mentioned obtains, the statute begins to run immediately upon the accrual of the right of action. It makes no difference that the damages resulting from any given act are not complete immediately after its performance, for it is the act itself that gives the right of action, and not the injury consequent upon it. In other words, as it is sometimes put, the gist of the action is the defendant's negligence or breach of duty, and therefore the statute begins to run from the negligence or breach, whether the action in point of form be in assumpsit or in tort. For instance, if an attorney neglects his client's business in such a manner as to break the implied contract between them, although a loss may not occur for years, a complete right of action accrued when the duty was violated, and the subsequent loss merely aggravates the injury. This was held in the case of Wilcox vs. Plummer, 4 Pet. 172, and while there is no decision upon this point in regard to the breach of his duty by a physician, yet the same rule would undoubtedly obtain. This appears to work a hardship in many cases, but the general principles according to

which statutes of limitations are construed, have led the courts to follow out logically the rule, that the statute of limitations commences to run as soon as the right of action arises.

An interesting question in this connection was brought before the court in the case of Gillette vs. Tucker,67 Ohio State 106. The facts in this case were, that the defendant performed an operation for appendicitis upon the plaintiff on November 3, 1897. During the operation the defendant placed in the wound made in the abdomen a cheese-cloth sponge. After an examination of the appendix it was found to be in a healthy condition, but there were indications that required an examination of the pelvic region. The incision made to reach the appendix was then closed, leaving the cheese-cloth in the cavity. The wound did not heal up properly but continued to discharge pus, and the defendant visited the patient daily at the hospital, and many times after the patient's removal to her home. Finally in the early part of November, 1898, some disagreement arose between physician and patient and all relations ceased between them. On April 12, 1899, another physician operated upon the plaintiff and the cheesecloth-sponge was discovered and removed. Upon this state of facts the court held that the statute of limitations did not commence to run against the plaintiff's right of action until November,1898, when the doctor dismissed the case. This decision was reached by a divided Court, three judges upholding the result and three dissenting. The Supreme Court being thus divided, the opinion of the Court below was sustained. This decision is undoubtedly bad law, and it has since been over-ruled in a case involving the same question. The complaint was for leaving a sponge in the plaintiff's abdomen, and the only right of action shown in the complaint was based upon the negligence at the time of the operation. Therefore the Court was not justified in treating the case as though the complaint alleged negligence in the after treatment and in allowing the sponge to *remain* within the abdomen. While the result reached is undoubtedly wrong and does not represent the law, yet the decision is important for its discussion of the principles governing the application of the statutes of limitation to malpractice and because it suggests several interesting questions.

In the first place the prevailing opinion brings up the very interesting question, whether a complaint could not be so framed as to evade the statute of limitations in the case of a sponge left after an operation, by alleging the negligence to consist in the failure to discover during the after treatment whether a sponge had been left, rather than by claiming negligence in the original act of closing up the wound without removing the sponge. There seems no reason why the fact that an action for injuries due to the first negligent act of leaving a sponge has been barred, should preclude a patient from recovering for subsequent negligence, provided the damages due to the two acts could be separated and apportioned. This point, however, must be considered as undecided.

The decision suggests the further question as to whether the fact that the injury did not immediately follow the wrongful act of the defendant could take the case out from under the operation of the statute. This question was not decided by the Court, although the prevailing opinion seems to assume that the cause of action did not arise in this case until the injurious consequences accrued. In this view the Court is not upheld by any of

the authorities or text-books so far as the writer is aware. The only exception to the rule, that the statute commences to run from the date of the wrongful act, is in the case of a breach by a public officer of duties which he owes to the public. The example ordinarily cited is the failure on the part of a Board of County Commissioners to repair a bridge by reason of which negligence some individual suffers injury. In such a case, it is held that the cause of action does not date back to the time of the officer's breach of duty in failing to have the bridge repaired, but arises only when, because of such negligence, the plaintiff suffered injury.

The third question suggested by the case of Gillette vs. Tucker is as to whether the circumstances that a patient is ignorant of the fact that a sponge has been left in the course of performing an operation, prevents the statute of limitations from running until he learns the cause of his injuries. The Court was careful to say, that it did not in any degree base its conclusions on the fact of the plaintiff's ignorance of her right of action. In the absence of express authority, however, this question might be considered a debatable one, for it is placing a very evident hardship upon the patient in such a case, since the circumstances are such as to keep her in complete ignorance of having a right of action. However, the authorities are so numerous and decisive to the effect that ignorance of a right of action does not prevent the statute of limitations from running, that the question would seem to be a decided one, though, there is, so far as the writer is aware, no authority directly in point in a case of malpractice. If the plaintiff's ignorance is due to fraudulent acts or statements on the part of the defendant, or, even in the absence of fraud, if the defendant conceals the fact that a right of action exists by any positive affirmative act and not by mere silence, the rule is different, and, following out the principle that no man shall profit by his own wrong, the Courts hold that the statute does not commence to run until the plaintiff learns of his right, or by the use of reasonable diligence might have learned. Thus if a physician, after negligently sewing up a sponge in a wound, should discover the fact, but in order to save himself, should persuade his patient that the resulting injuries were the ordinary consequences of the operation, and that there was no neeed of any exploratory operation or the exercise of any other means of relieving his condition, the statute would not bar the right of action until after the statutory period had elapsed from the time when the plaintiff first learned of the cause of his injuries. Where no such acts of fraud and concealment can be shown, the decisions in analogous cases would seem to absolutely preclude the plaintiff from pleading ignorance in answer to a plea of the statute of limitations. Thus in the case of School District vs. De Weese, 100 Fed. 705, the facts were as follows: The cashier of a bank had acted as agent for the School District Trustees in refunding certain bonds. After getting the old bonds that had been refunded into his hands ,the cashier resold a portion of them and kept the proceeds. The plaintiffs attempted to hold the bank as being responsible for the conversion of its agent, and the bank interposed the plea of the statute of limitations. The Court held, that, inasmuch as there had been no active concealment on the part of the bank of the wrongful acts of its cashier, the statute had commenced to run at the time of the conversion of the property, and says: "It must be the concealment or improper conduct of the defendant

which stops the running of the statute of limitations. The bank made no misrepresentation to the plaintiff respecting this matter. It concealed nothing from him. * * * Concealment by mere silence is not enough." Decisions to this effect are numerous in other branches of the law, and would seem to cover by analogy the question presented in such a case as that of Gillette vs. Tucker. This is the opinion of the dissenting judges in that case, and while the prevailing opinion reached its conclusion on another course of reasoning, yet Glilette vs. Tucker may be considered an authority, to the effect that ignorance of his rights on the part of the plaintiff, does not prevent the running of the statute.

A question which often arises is as to whether, in case a suit for fees is brought by a physician after the expiration of the statutory period within which a suit may be brought by the patient for malpractice, the defendant can set up such malpractice by way of defense or counterclaim. It may be stated as a general rule that the statute of limitations operates upon a claim which is set up by way of set off or counterclaim in the same way and to the same extent as if such claim were made the basis of a separate and distinct action. This rule, however, is not universal, and it is held by the courts of some states and is established in others by statute, that the claim if interposed by way of counter claim or set off is not barred, although if it had been attempted to bring a separate and distinct action the statute would have been a bar. It is further to be noted that even in those states, where malpractice, after the statutory period, could not be pleaded by way of counter claim, in order to entitle the defendant to recover independent damages, yet it could be set up as a defense to reduce the amount of the plaintiff's recovery. In other words, the plaintiff in a suit for fees must necessarily show that the services rendered were of some value, in order to entitle himself to recover for them, and although the defendant might have delayed too long to bring an action for malpractice, he would yet be entitled to show, for the purpose of diminishing the plaintiff's recovery, that the services were of no value, and that the defendant had violated his implied contract to use due skill and care.

Another point to be noted in connection with the subject of malpractice, when set up as a counterclaim, is this; that the bringing of a suit for fees stops the running of the statute of limitations against any counterclaim which the defendant patient may have, and if the patient's claim for malpractice was not barred at the time that the suit for fees was started, the mere fact that the statutory bar has expired before the defendant puts in his counterclaim, does not result in barring his right of action. A case illustrating this rule is that of Perkins vs. Lumber Co., 120 Calif. 27. This was an action by an attorney for the value of services rendered. The defendant pleaded by way of counterclaim that he had been damaged by the plaintiff's giving him bad professional advice. The action was commenced on April 24, 1890, and the counterclaim was pleaded July 21, 1894. The period within which the defendant could have brought an action for damages expired June 21, 1894. It was held that under these circumstances the commencement of the action for fees suspended the running of the statute of limitations, and the counterclaim was held good. In such a case, however, the counterclaim would not entitle the defendent to affirmative relief; it would merely entitle him to diminish the amount of the plaintiff's recovery.

He could not secure a judgment for damages exceeding the amount sought to be recovered by the plaintiff.

It is apparent from this brief survey of the subject that the application of the statute of limitations in actions of malpractice is not always simple, and that the statutes themselves are not in all respects satisfactory. In the first place one section of the statute and only one should apply to actions of malpractice; there should be no distinction, so far as the statute of limitations is concerned, between actions sounding in tort and actions ex contractu. In the next place the periods prescribed by many of the statutes are too long. The evidence for a defendant physician in cases of this character, is usually verbal and dependent upon the memory, and hence with the lapse of time it becomes exceedingly difficult for the defendant to establish his side of the case. On the other hand the evidence for the plaintiff is easily fabricated, and the fabrication grows increasing easy with the lapse of time. It is the province of, and lies within the power of, the medical profession to remedy these evils, The medical profession should see to it that the statutes of their respective states are so changed as to establish a uniform period of limitations, the period of two years appearing to the writer to be the most just and equitable period for both plaintiffs and defendants, and these statutes should not be in general terms but should specifically include actions for malpractice. Section 5203 of the Revised Code of North Dakota is a good example to follow. The language of that section is as follows:

"Section 5203. Within two years:

3. An action for recovery of damages resulting from malpractice."

Point One

Fifty Per Cent. More of Your Liability is Protected by the Contract of The **Physicians Defense Company** Than by Any Other Proposition Before the Profession.

That's Important

SAMUEL D. GROSS.

1805-1884

From the statue erected in Washington, D. C.

Medico-Legal Bulletin

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 4 | MARCH 1907 | No. 10

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

One Dollar Per Annum

ADVERTISING RATES FURNISHED UPON APPLICATION. Non-ethical advertisements will not be received, the publishers reserving the right to reject and discontinue any advertisement at any time.

AN EARTHQUAKE, A CONFLAGRATION AND A MORAL.

"For what, then, have I been paying premiums all these years?" inquired an astonished merchant whose business had been burned out in the San Francisco fire and to whom Attorney Eustace Cullinan had just read aloud the paragraphs from his policies.

"For nothing," he replied, "except the privilege of appealing to the generosity of the companies. Every one of your policies contains conditions which exempt the company from liability in seven cases of loss out of ten. If the companies insist on the letter of the policies and will pay no more than they can be compeled to pay you will get only a very small portion of your insurance."

"But I accepted these policies without reading them. I did not know even the names of the companies. It has been my custom for years to give my insurance to a broker, a very good fellow, who parceled it out as he pleased. A little of the business I turned over to the widow of an old friend, who has dependent children, and is struggling to make a living by soliciting insurance. I thought that all the companies were about equally good, and that they all used a standard form of policy. "

* * * * * * * * * * * * * * *

How many similar instances have occurred amongst the reputable practitioners throughout the country, when a case arose where professional reputation was at stake as well as property loss; and simply because Malpractice protection had been carelessly purchased. You may be under obligation to the good fellow, the widow, the friend or patient

in placing your protection, but you are under a greater obligation to **YOURSELF.** Malpractice protection over and above all other forms of protection, **must be good.**

Fifty per cent. more of your Malpractice Liability is protected by the Physicians Defense Company's contract than by any other proposition before the profession.

THAT'S IMPORTANT.

The **guaranteed** plan of the specialist, based on scientific and moral axioms, maintained at the highest efficiency.

THAT'S MORE IMPORTANT.

You are protected from all annoyances in the vast majority of instances, as demonstrated on hundreds of occasions.

THAT'S MOST IMPORTANT.

Hence, purchase a contract of the Physicians Defense Company and keep it in force.

Point Two

On the next page you will find a suit based on technical assault, which is of considerable importance. It is to forestall such accusations that this Company has prepared a "Consent to Operation" blank. Such blank, properly filled out and signed before an operation, would be incontrovertible as evidence in case of suit, and would, in all probability, prevent the annoyance of the same. Upon request, we furnish these blanks **free** to our contract holders.

Incidentally, we would say that although several large judgments have been rendered in suits for technical assault, nevertheless, the Physicians Defense Company has defended seven such suits and has vindicated its contract holder in each instance. Simply because the Company was prepared on that proposition before the malpractice fiends "caught on." Now they are eight years behind the Company in preparation.

That's More Important

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession.

MALPRACTICE—FAILURE TO SECURE CONSENT OF PATIENT TO OPERATION.

PRATT vs. DAVIS, 79 N. E. 562, (ILLS.) DECEMBER, 1906.

Action by Parmelia J. Davis, by next friend, against Edwin H, Pratt. From a judgment of the Appellate Court (118 Ill. App. 161) affirming a judgment for plaintiff, defendant appeals. Affirmed.

SCOTT, C. J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the Circuit Court of Cook County in favor of appellee and against appellant, for the sum of $3,000, in an action for trespass to the person.

Appellant is a physician in the city of Chicago, and at the time of the wrong charged was conducting a sanitarium on Diversey Boulevard. Appellee, a married woman about 40 years of age and a resident of the same city, came to this sanitarium for treatment for epilepsy in May, 1896. She had been subject to epileptic seizures for a period of 15 years, but up to this time had been able to perform her household duties and had borne four children, three since she first exhibited symptoms of epilepsy. The seizures had gradually been increasing in frequency. Following each of them she would be very weak in body and dazed and uncertain in mind for several hours. The evidence of those who knew her in her daily life is generally to the effect that her mind, except during the periods immediately following these attacks, was normal. Appellant made an examination of the pelvic organs, and found that the uterus was contracted and lacerated, and that the lower portion of the rectum was diseased. On May 13, 1896, he operated for these difficulties. Thereafter she remained in the sanitarium without improvement several weeks and then returned home. On July 29, 1896, her brother-in-law, at request of her husband, took her again to the sanitarium, and on the next day appellant performed a second surgical operation upon her, removing her ovaries and uterus. She continued at the sanitarium until the 8th day of August, 1896, and then was removed to her home. Neither operation was successful, so far as improving her health was concerned. She grew gradually worse mentally, and on August 25, 1896, was adjudged insane and sent to the state asylum at Kankakee, and was not a witness in the trial of this case. The cause of action is based on the removal of the uterus at the second operation. It is not claimed that the operation was unskillfully preformed, but that it was performed without the authority or consent of the appellee and constituted a trespass to her person.

The declaration, so far as now material,

averred that appellee had placed herself under the care of appelleant, and that he without her consent or the consent of any one authorized to act for her, anæsthetized her and removed the uterus. Appellant interposed the general issue and a special plea of leave and license for doing the acts complained of. To the special plea a replication was filed denying the leave and license. There is no pretense that appellee herself consented to the removal of the uterus. In fact, appellant himself testified that he told Mrs. Davis just enough about her condtiion, and what he proposed to do, to get her consent to the first operation, and says, quoting his own language: "I worked her deliberately and systematically, taking chances which she did not realize the full aspect of, deliberately and calmly deceiving the woman; that is, I did not tell her the whole truth." And, referring to the first operation, he says: "She knew that the womb was to be operated upon, and she was willing that should be done. Consent for further work was not obtained." The record does not disclose the circumstances under which the anæsthetic was administered prior to the second operation. Appellant, however, contended that the appellee was so mentally unsound as to be incapable of consenting or giving intelligent consideration of her condition, and that her husband authorized the second operation. Whether appellee was then mentally incapable of consenting was a question as to which the evidence was conflicting. The trial court held a proposition of law stating that the burden of proof was upon the appellant to show leave and license and it is said that this was improper in view of the averments of the declaration. If the declaration made necessary proof of the fact that the operation was performed without the consent of the appellee or some one who under the law could act for her, the plea setting up leave and license was plainly useless. Ordinarily, where the patient is in full possession of all his mental faculties and in such physical health as to be able to consult about his condition without the consultation itself being fraught with dangerous consequences to the patient's health, and when no emergency exists making it impracticable to confer with him, it is manifest that his consent should be a prerequisite to a surgical operation. Where the narrative shows the act to have been a trespass to the person, or avers it to have been without the consent of the patient, it would seem unnecessary to go farther and negative the fact that some other person lawfully authorized to act for the patient consented. The question of the consent of such other person, if in the case, might well be left to be presented by a plea in bar.

We have carefully reviewed the evidence as abstracted and are satisfied that it does not tend to show that the husband consented to the second operation. He testified that he did not, and that, when he first took his wife to the sanitarium, appellant told him the operation would be a trifling one, and appellant says that, while he may have said this, "Davis said he was willing that I should do anything I thought necessary, only he made the request that I do as little as possible," and that appellant then told Davis, in substance, that two operations might be necessary. Following that conversation the first operation was performed, and later the woman went home. While she was at home appellant says: "Mr. Davis, plaintiff's husband, told me she was no better. I told him to bring her back for the finishing work. I did not tell him what the finishing work would be. I had but one comprehensive talk with him. That was the time he was there

with the plaintiff." These two conversations are relied upon by the appellant as authority given by the husband for the second operation. Without deciding what legal effect should be given to the husband's request or consent that a grave surgical operation be performed upon his insane wife, we think it manifest that the authority given by the husband in the conversation above quoted from appellant's testimony was exhausted when the first operation was performed and the patient taken away. While it is true that the appellant says he told the husband in that conversation that he could not tell the extent of the surgery that would be necessary, and says that Davis gave him carte blanche to do whatever he saw fit, it is yet apparent that neither then contemplated that the wife would be taken home after the first operation and later brought a second time to the sanitarium for the purpose of undergoing a second operation, and we think it equally apparent from appellant's testimony that the husband did not, at the time he was directed to bring his wife again to appellant for treatment, understand that any such operation as the removal of the ovaries and the uterus was to be performed, and that the mere fact that he, after that conversation, had his brother take appellee to the sanatirium, is not to be regarded as tending to show consent to surgery of that character. As appellee did not consent and the evidence does not tend to show consent given by the husband, it is unnecessary to determine whether the holding of the trial judge to which we have above adverted was correct in the anomalous state of the pleadings. In any event it was harmless.

Appellant then contends that, in the absence of express authority to remove the uterus, the law will imply the necessary consent from the fact that consent was, as he says, obtained for the removal of the ovaries. Before bringing this suit, appellee instituted a former suit against appellant, which seems to have been disposed of without any determination of the rights of the parties. In that suit the declaration, which was filed on September 11, 1896, averred that the ovaries had been, with the consent of the appellee, removed at the first operation upon the promise of appellant that their removal would cure plaintiff, but that their removal, instead of alleviating her condition, aggravated her troubles, and that she thereafter returned to the sanitarium, and that appellant then, without her consent or that of her husband, removed the uterus. In this suit the only claim is for damages occasioned by the removal of the uterus, and in the course of the trial of the case now at bar counsel for appellee stated that he was claiming nothing on the account of the removal of the ovaries. Appellant argues that it appeasr from the facts thus recited that consent was obtained for the removal of the ovaries, and that correct surgical practice requires that, when the ovaries are removed the uterus should also be removed, and that consent for the removal of the ovaries having been obtained, the right to remove the uterus followed. Appellee, by her brief, says that consent was given for the first operation, and that when she brought the first suit she erroneously believed that the ovaries were removed at that operation. Be this as it may, the declaration in the first suit does not estop appellee to show that she never consented to their removal, and ,as their is no evidence which tends to show that any permission was obtained for the second operation, when they were in fact removed, there is therefore nothing to raise the implication in question.

It is also urged that consent is to be

implied from the relation of the parties, and the following proposition of law was submitted as embodying that defense: "The court holds, as a proposition of law, that, when a patient places herself in the care of a surgeon for treatment, without instructions to the surgeon or limitations upon his authority, she thereby, in law, consents that he may perform such operations as in his best judgment, care and skill is necessary, proper and essential to her welfare, and in case the surgeon performs an operation upon the plaintiff, and there is no complaint against the surgeon for want of the exercise of care and skill, there can be no recovery." The court held this good as an abstract proposition of law, but did not regard it as controlling here, for the reason, as we must assume, that the evidence did not show a state of facts that made this proposition determinative of the controversy. We are therefore not called upon to decide whether this was a correct statement of the law.

Complaint is made to the action of the court in overruling objections to testimony elicited by appellee from her expert medical witnesses in answer to hypothetical questions. This was a trial without the intervention of a jury, and errors in this regard, if they exist, do not require reversal, as there is in the record abundant competent evidence to justify the findings of the court. Merchants' Despatch Transportation Co. vs. Joesting, 89 Ill. 152.

It is next urged that the evidence shows no actual damages, that the judgment must therefore be made up of nominal damages and exemplary damages, and that this is not a proper case for the infliction of a penalty, wherefore the judgment should be reversed. The claim that there is no proof of actual damages is based upon this statement found in appellant's argument: "There is nowhere in the record a syllable showing any pain or suffering as a result of the removal of the uterus." Some facts require no direct proof. That pain and suffering follow the removal of the uterus is one of such facts. The law infers pain and suffering from personal injuries. 1 Sutherland on Damages (1st Ed.) p. 766.

Further objections are made to the action of the court in passing upon the proposition of law submitted. These objections, insofar as they are worthy of serious consideration, are disposed of by what has already been said in this opinion. Where the patient desires or consents that an operation be performed, and unexpected conditions develop or are discovered in the course of the operation, it is the duty of the surgeon, in dealing with these conditions, to act on his own discretion, making the highest use of his skill and ability to meet the exigencies which confront him, and in the nature of things he must frequently do this without consultation or conference with any one, except perhaps, other members of his profession who are assisting him. Emergencies arise, and when a surgeon is called it is sometimes found that some action must be taken immediately for the preservation of the life or health of the patient, where it is impracticable to obtain the consent of the ailing or injured one or of any one authorized to speak for him. In such event the surgeon may lawfully, and it is his duty to, perform such operation as good surgery demands, without such consent. The case before us, however, does not fall within either of these two classes.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MALPRACTICE—MEASURE OF DAMAGES FOR INJURIES TO ARM DUE TO MALPRACTICE IN REDUCING FRACTURE.

ALBERTSON VS. LEWIS, 109 N. W. 705 (IOWA) NOVEMBER, 1906.

BISHOP, J. The fracture sustained by plaintiff was of the bone of the arm between the elbow and shoulder, and occurred on December 5, 1903. It is the allegation of the petition that defendant, through want of skill, negligently set and treated plaintiff's arm so that it became crooked and has a large hump thereon, and is useless to plaintiff; that the disfigurement so caused is permanent in its nature. As related to the subject of damage, pain and suffering, mental and physical, and past and future, is alleged; also loss of time and diminished earning capacity. That the fracture of the bone of the plaintiff's arm was properly reduced in the first instance is not disputed in the evidence. Nor is it disputed but that down to February 25th, following, at least, the subsequent treatment administered by defendant was proper in all respects. Plaintiff testified that, on the date last mentioned, defendant took off the zinc cast in which his arm had previously been encased, and put on in place thereof a simple gauze bandage; that he then gave instructions to plaintiff to use the arm, saying that it would gradually grow stronger. In respect to the appearance of the arm at that time plaintiff says that it was not crooked as far as he could tell from the looks. He further says that he wore the bandage so put on some three or four weeks, when he took it off; that the arm "was then as crooked as it is now." Defendant, on the other hand testified that he saw plaintiff last on January 15th, at which time he examined the arm and found the fractured ends of the bone in proper apposition; that he continued the arm in the zinc cast, and that plaintiff did not thereafter return for further examination or treatment as he was requested to do. The several surgeons called as witnesses on the trial agreed that an examination of the plaintiff's arm disclosed a case of what is termed delayed union; that is, a failure of the fractured ends of the bone to reunite or grow together within the time usual to a perfect unoin. And further, that the angular deformity in the arm was caused by the fact that the broken ends of the bone were not in perfect apposition. As to the failure of the bone to reunite, it is agreed that such was due to conditions inhering in the patient himself, and not to any improper treatment on the part of the surgeon. That the imperfect apposition was due to the absence of an immovable dressing such as to secure immobilization, and the use of his arm by plaintiff, seems to be conceded; the surgeons were not, however, directly interrogated on the point.

The foregoing statement has seemed necessary to an understanding of the errors assigned and relied upon for a reversal. It will be apparent therefrom that negligence on the part of the defendant, if any such there was, could only be predicated on a finding of a truth of plaintiff's contention to the effect that on February 25th, a gauze bandage was substituted for the zinc cast, and that he was then directed to make use of his arm. Doctor Cram a witness for plaintiff testified that, in his judgment, an operation on plaintiff's arm called "resection" would be necessary if any better result than plaintiff now had was to be expected. Over the objections of defendant, he was then permitted to testify as to the reasonable value of a surgeon's services in performing an operation of resection. Here was an error. And if there were no other

reasons, the error becomes apparent when it is observed that the petition contains no allegation that, as a result of defendant's negligence, the condition of plaintiff's arm is such that a future operation is or will become necessary, and that plaintiff will be put to expense on account thereof. Quite to the contraty the petition presents the case of a fixed and permanent injury, and the demand for damages is grounded wholly on that theory. This being the state of the record, we need not determine whether the expense incident to medical and surgical attendance should be classed as general or as special damage—a point on which there is more or less of conflict in the authorities. 13 Cyc., p. 183.

It is sufficient to say that in any view the defendant was not called upon to defend as against any claim of future damages—to accrue, if at all, as plaintiff might elect—growing out of a matter respecting which, of the petition speaks at all on the subject, the averment is that such an operation, and hence the attending expense, would be unavailing to afford relief and therefore useless. Following the reasoning of the foregoing paragraph it must be said that the court erred in charging the jury that, in fixing the amount of plaintiff's damage, if he was found entitled to recover, they might take into consideration "the reasonable and necessary expense for another operation on the arm in question," etc. In addition to what is said in the preceding paragraph it might be further said that it was not made to appear that an operation in the future was within the contemplation of the plaintiff. The evidence having any relation to that subject was confined to the expression of opinions on the part of the surgeons testifying as to the probable outcome of an operation should one be had, and further, that they had recommended the operation of resection as proper to be resorted to. That it is error to instruct on matters not within the issues, and in respect to which there has been no attempt to make proof, is fundamental doctrine. Moreover, as the case was submitted to the jury, they were authorized to find damages as for a permanent injury, and also damages as for the expense incident to a possible attempt to remove the permanency of the disability and restore the arm to normal conditions.

Appellant also complains that in the charge the jury was told that, in fixing the amount of plaintiff's damages, they might take into consideration the impairment of his health in addition to the injury sustained by him to his arm and his loss of ability to work and labor. Here, also, was matter wholly foreign to the pleadings and proof, and hence error. It had not been suggested on the trial that plaintiff had suffered any injury or damage to his general health by reason of the negligent act of defendant complained of.

Further, error is assigned for that that court submitted to the jury as an element of damage the "pain and suffering actually endured by him and such as it is reasonably apparent he will endure in the future, so far as the same is shown to have been caused by the alleged negligence complained of." On the subject of his physical pain the evidence for plaintiff is confined to this simple statement: When I work hard the arm pains me slightly at times. I do not experience any serious pain." There is nothing in the record to warrant a conclusion that such pain as he did suffer was attributable in any degree to the fact that, in growing together, the broken parts of the bone were not in perfect apposition to each other. And the imperfect apposition is the only matter appearing upon which the charge

of negligence could be sustained. As the matter of a possible future operation was not in the case, the pain and suffering that might be incident thereto could not, of course, be considered. There being no ground upon which to base a recovery as for physical pain, such should not have been submitted for the consideration of the jury, and the submission thereof by the court was error.

Other errors are presented in argument, but we need not discuss them. They are either without merit, or are such as will not likely arise upon a future trial. We conclude that a new trial must be, and it is, ordered.

Reversed.

MALPRACTICE.—EVIDENCE NECESSARY TO SUSTAIN VERDICT.

CHAMPION VS. KIETH, 87 PAC. 845 (OKLA.) SEPTEMBER, 1906.

This was an action brought by the defendant in error against the plaintiff in error to recover damages for injuries alleged to be the result of negligence and improper treatment of the defendant in error while under the care of the plaintiff in error, as a surgeon. The record discloses that the defendant in error on the 5th day of February, 1903, while handling a sack of grain in a flouring mill in the city of Enid, where he was working, turned suddenly and his hip gave way; that the plaintiff in error was called to attend him, and, upon answering the call, went to the mill and found the defendant in error lying on the floor. It being too cold to operate there, the surgeon had the defendant in error removed to a nearby office. He then undertook to examine the hip, but the defendant in error complained that it hurt him, and that he could not stand to have it examined. The plaintiff in error gave the patient chloroform, and called Dr. H. C. Bowers to assist him in the operation. When Dr. Bowers arrived, they examined the patient as the record discloses, very thoroughly, and arrived at the conclusion that the thigh was dislocated. They set it and put it in a plaster of paris cast, had the patient taken home, and afterwards both visited him three or four times until he left the city of Enid. As to the care and treatment that was given the patient, there seems to be no dispute, the evidence on this subject being that of the plaintiff in error and his assistant, Dr. H. C. Bowers, their testimony being uncontradicted. The evidence also discloses that the plaintiff in error was a practicing physician and surgeon of 14 years' experience, a graduate of the Louisville Medical College, of Louisville, Ky., having taken several post-graduate courses; that Dr. H. C. Bowers is also a reputable surgeon of several years' experience, a graduate of the University of Louisville, having attended the college of St. Bartholomew at London, England, and having had experience in treating a large number of cases of similar character. As shown by his testimony he had treated some 30 or 40 cases of hip dislocation and fracture. The record also discloses that sometime prior to the injury the defendant in error had been kicked on the hip by a horse, and at the time of the treatment of the injury here that the flesh about the hip was yet discolored from the effects of the kick. The defendant in error, at the time of the trial, had not fully recovered from the injury, and was unable to perform any great amount of manual labor. It was the contention of the defendant in error at the trial that the injury, instead of being a dislocation of the hip joint, as diagnosed by the physicians at the time of the treatment, was in fact a fracture of the surgical neck of the femur, and that

the negligence consisted not in the fact that the plaintiff in error was not a physician of ordinary skill, but in that he did not use the ordinary care necessary to make a correct diagnosis of the injury, and in not giving the patient treatment for the injury actually sustained, viz:, that of fracture, but, on the contrary, treating the patient for dislocation, the result being that the plaintiff failed to recover. A large number of expert witnesses were called and examined, and, as is usual in such cases, the testimony covered a broad field. To maintain the case of the defendant in error at the trial, several medical witnesses were produced, who had made examination of the patient long after the injury, and from their diagnosis they seemed to be of the opinion that the injury was a fracture of the surgical neck of the femur, and that they could discover no dislocation. This briefly states the facts of the case. The remaining facts appear in the opinion.

•Pancoast, J. (after stating the facts). A number of errors are alleged in the petition in error, but only one is argued in the brief; that is, that the evidence at the trial failed to establish negligence or want of care. At the outset it might be well to state the rule of responsibility governing practicing physicians and surgeons under such circumstances. It is that: "He is never considered as warranting a cure, unless under a special contract for that purpose. His contract, as implied by law, that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession, that he will use reasonable and ordinary care and diligence in the treatment of the case which he undertakes, and that he will use his best judgment in all cases of doubt as to the proper course of treatment. He is not responsible for damages for want of success, unless it is shown to be the result of want of ordinary skill and learning, such as ordinarily possessed by others of his profession, or for want of ordinary care and attention. He is not presumed to engage for extraordinary skill or for extraordinary diligence or care, nor can he be made responsible in damages for errors in judgment, or mere mistakes in matters of reasonable doubt or uncertainty." Tefft vs. Wilcox, 6 Kan. 61; Branner vs. Stormont, 9 Kan. 51; Bigney vs. Fisher (R. I.) 59 Atl. 72; Ewing vs. Goode (C. C.) 78 Fed. 442; State vs. Housekeeper (Md.) 16 Atl. 382, 2 L. R. A. 587, 14 Am. St. Rep. 340; Cayford vs. Wilbur (Me.) 29 Atl. 1117; O'Hara vs. Wells (Neb.) 15 N. W. 722; Langford vs. Jones (Or.) 22 Pac. 1069; Martin vs. Courtney (Minn.) 77 N. W. 815. This rule of responsibility is treated in many different ways, but the one above quoted, we think, substantially gives the rule in a succinct form.

Now, applying the rule to the evidence in this case, is the evidence sufficient to establish a case against the plaintiff in error? There was no attempt to show that the plaintiff in error did not possess that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession. The effort was to show that he did not use reasonable and ordinary care and diligence in the treatment of the case; in other words, that he did not properly diagnose the case, and treated it for one of dislocation, when he should have observed that there was a fracture and treated it as such. The testimony of the plaintiff in error and of his assistant, Dr. Bowers, abundantly show that there was a dislocation. It seems from their testimony that the dislocation was easily determined. There was, however, some little apprehension that there might be a

fracture, but from the extended examination made it could not be determined; but in order to be doubly sure, they placed the injured limb in a plaster of paris cast, which they claim would have been proper treatment not only for dislocation, but for fracture as well. There is nothing in the record that indicates that the plaintiff in error and his assistant did not use all methods at their command to make a correct diagnosis of the injury.

It is claimed, if there had been a fracture, that while in many cases it might be difficult to diagnose, yet ordinarily the fact could have been ascertained. The plaintiff in error on this case, according to the testimony of both physicians, did make an effort to determine whether or not there was a fracture, and failing, as they say, to determine any indications thereof, proceeded as for a dislocation. On the trial below all the witnesses for the defendant in error conceded that a fracture of the neck of the femur was hard to detect, and that the best surgeons sometimes found it impossible to determine, stating that some of the best medical authorities declared that it is sometimes very hard to distinguish between dislocations and fractures of the surgical neck of the femur. The evidence also abundantly shows that injuries to the hip, whether that of fracture or dislocation, even under the most skillful treatment, often result very unsatisfactorily, and in diseased conditions more or less permanent in their character.

To establish the claim of unskillful and negligent treatment, Dr. Baker was called by the defendant in error. It appears that he had examined the patient several months after the injury, and from his examination testified, among other things as ,follows: "There was no dislocation that I could determine. We arrived at the conclusion it was a fracture. The fracture was of the surgical neck of the femur. In my opinion, if it wasn't a fracture—I don't say positively that it was; I don't think I said positively it was a fracture; I could have been mistaken in regard to it being a fracture, but my opinion was it was a fracture."

Dr. Way being called by the defendant in error, testified, among other things, as follows: "We partially made a diagnosis of the neck of the femur, but, as has already been testified to here on the witness stand, there were other things necessary to make the examination complete; I mean the X-ray photograph." Being asked to tell the jury whether or not such a fracture as an unimpacted fracture of the neck of the femur would or would not have been easily detected, he answered: "Well I would say that it is hard to detect, because our best writers claim sometimes it is impossible for us to detect it. Wythe is one of the best men. He claims it is hard sometimes to distinguish between dislocation and fracture of the neck of the femur."

As stated before the testimony covered a wide range, but the above just quoted is that bearing directly upon the point under discussion. The testimony of other witnesses is practically the same. The question now arises, was there negligence in the treatment of this case? If so, where is the evidence that shows it? Even admitting that there was a mistake in the diagnosis of the case, still the evidence, in our opinion, fails to establish negligence. It might be here observed that even if the testimony of the defendant in error showed that there was in fact a fracture, which we do not think it does to any reasonable degree of certainty, still the examination having been made long after the injury, and at the time when all of the witnesses admit that a

better and more satisfactory examination could be made than at the time of the injury, it would be the subject of some criticism on that ground. Not a single witness testified with any reasonable degree of certainty that a fracture actually did exist.

The testimony also shows that several attempts had been made to take a photograph with an X-ray machine, and while the testimony of the witnesses shows that that is the only method that can be employed with reasonable certainty whether or not a dislocation or fracture exists, yet that is not always satisfactory, as a proper photograph can not always be had, owing to the thickness of the parts and the shadows of the large bones, and it is only with the very best of these machines that a perfect photograph can be obtained. It might be noticed here that the testimony of expert witnesses, in cases of this kind, is only at best opinionative; there is usually nothing in it very definite or conclusive. Opinionative testimony is never more than merely persuasive.

Counsel for the defendant in error refer to a rule often laid down by this court, that the verdict of a jury which is reasonably supported by the evidence will not be disturbed on appeal, but that is not the question before us. The question is whether there is any evidence to support the verdict; in other words, wherein does the evidence show carelessness or negligence, either in diagnosing the case or in treating it afterwards? Even admitting that there was a fracture of the neck of the femur, what could have been done to determine such other injury other than what was done? It does not follow, because the treatment resulted unsatisfactorily, that therefore the surgeon was negligent. There is no claim that the examination was not thourogh and carefully made, nor that the physician lacked the knowledge necessary to treat such cases; and we think it is a matter of common knowledge that in very many cases of like injuries, as well as others, under the most skillful treatment, nature fails to respond properly and the result is permanent injury. We also know that some persons recover readily from injuries that are the most serious, in fact cases that seem at first to be almost if not quite hopeless, while others fail to recover from very slight injuries. This is not because of any want of skill or of negligence of the surgeon, but it is because of the inherent recuperative power in the patient on the one hand, and the lack thereof on the other.

In the trial of cases such as the one before us, courts should proceed with great care, as frequently there is liability that prejudice will creep into the minds of the jurors and ofttimes a jury is liable to arrive at unwarranted conclusions; and from a reading of the entire record it would seem that such is the case here, as the record discloses that the plaintiff in error is a reputable surgeon, possessing the ordinary skill and ability required; that he used the precaution of calling in an assistant with perhaps even more skill and knowledge than he himself possessed, that their examination was very thorough, that all appliances and precautions at their command were used, that the treatment given was proper and skillfully applied, and that the attendance afterwards was diligent on the part of both surgeons, the result alone, however, being unsatisfactory. To hold the plaintiff in error liable in damages under such conditions would amount to a warranty of a cure, and this, too, in a case treated on his part as one of charity, without any expectation of a fee or an intent to charge one.

Having reached the conclusion that the evidence fails to sustain the verdict, the

judgment of the Court below must be reversed, and the cause remanded for a new trial. It is so ordered. All the Justices concurring, except Garber, J., not sitting.

INDICTMENT AGAINST ADVERTISING PHYSICIAN FOR PRACTICING WITHOUT A LICENSE.

STATE vs. WILHITE, 109 N. W. 730, (IOWA) NOVEMBER 1906.

The indictment charged that the accused did willfully and unlawfully practice medicine, and then and there did publicly profess to cure and heal the diseases and ailments to which the flesh is heir by means of a certain system, a more particular description of the peculiar and mysterious workings of which are to this grand jury unknown; that said J. C. Wilhite then and there did advertise in the Ft. Dodge Messenger that by said system he could cure and heal tuberculosis, and cause the same to be cured, and did advertise in said paper that he is a doctor of neurology and opthalmology with an office at No. 526½ Central Avenue in Ft. Dodge, Iowa, with office hours from 9 to 12 and 1:30 to 4:00, that said Wilhite did then and there maintain such office, and had placed near the entrance to such place an advertisement sign containing the words: "Dr. Wilhite, Neurologist," and by means of such advertisement did solicit persons to meet him at his office to participate in the beneficent results arising from treatment under his system; that said J. C. Wilhite did then and there undertake to cure and heal diseases and ailments, and that said J. C. Wilhite then and there did not have a certificate nor a license from the proper authorities so to practice, nor did he file with the County Recorder of Webster County, Iowa, any such certificate to practice, and never applied therefor. The defendent was convicted and appeals. Affirmed.

LADD, J. Before the trial the defendant objected to the indictment on three grounds: (1) For that he did not charge any offense under the laws of the state, (2) it was so indefinite as not to inform the accused of the charge against him, and (3) it attempted to charge several distinct and separate offenses. Though inartistically drawn, it is not open to any of these criticisms. It specifically alleges that the defendant practiced medicine, then averred his acts which constituted so doing, and that this was without certificate from the proper authorities. It may be that his acts were set out with more particularity than was essential, but at the most this amounted to no more than pleading evidence. Section 2580 of the Code provides that "any person who * * * shall practice medicine, surgery, or obstetrics in this state without first having obtained and filed for record" a certificate from the state board of medical examiners, shall be punished. Section 2579 of the Code declares that "any person shall be held as practicing medicine, surgery or obstetrics, or to be a physician, within the meaning of this chapter, who shall publicly profess to be a physician, surgeon, or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal." Here follow certain exceptions not involved in this case. The evident object of the pleader was to allege acts of the accused which would bring him within the definition of the section last quoted. To accomplish this the indictment alleges (1) that he publicly professed to cure and heal by means of a system unknown to

the grand jury; (2) that he advertised so to do in a certain newspaper; (3) that he maintained an office with the sign of a doctor for this purpose; and (4) that he actually undertook to cure and heal. These acts are not charged as separate offenses, but as contemporaneous acts which considered together constituted the practice of medicine. The indictment as it alleged but the one offense, and pointed out the person accused, was sufficient. Section 5290, Code 2.

Dr. Kime testified that "Dunglison's Medical Dictionary, Revised Edition," is accepted by the medical profession as authority in the definition of words, and thereupon the definitions of "anatomy," "neurology," "ophthalmology," "pathology," and physiology" contained therein were introduced in evidence, over the defendant's objections. Even though the court might have taken judicial notice of the meaning of these words it was not error to receive a standard medical dictionary in evidence, as an aid to the memory and understanding of the court. Cook vs. State (Ala.) 20 So. 360. See Nix vs. Hedden, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745. State vs. Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623; note to Lanfoar vs. Mestier 89 Am. Dec. 663; Bixby vs. Ry. Co., 105 Iowa 293, 75 N. W. 182, 43 L. R. A. 533, 67 Am. St. Rep. 299, and like cases are not in point. They hold that medical works, treating of the symptoms and cure of diseases, are not admissable, not that standard authorities may not be received as proof of the meaning of medical terms.

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4. Complaint is made of the sixth paragraph of the charge. It has the support of State vs. Heath, supra, and State vs. Edmunds, 127 Iowa, 333, 101 N. W. 431. Instructions must be construed with reference to the evidence introduced, and when this is done no valid objection appears to that given. The evidence established the defendant's guilt. True, he modestly ascribed to nature the healing of all diseases, and merely claimed to discover and remove the causes so as to give nature a chance. To accomplish this he proposed to "stop the leaks in the nervous system and repair the damages done, by methodical rest and dietetics." In a long creed, criticising the treatment of disease by physicians generally published in a local paper, he announced himself "the master mechanic of the human body" and added: "The system I practice is taught in but one school in the world, and I am a graduate of that school," and proceeded: "If your organs are not all working properly, call on a master mechanic who will remove the cause. If there is a leak of power, he stops it. If there is a pressure on some of the shaftings (or nerves) causing a hot box (or pain), he removes it. If the right fuel has not been used, he orders the right kind, and if the fireman does not know how to fire, he teaches him or her the business." And after quoting a letter said to have been received from a patient, said: "I do not claim to be a specialist on tuberculosis any more than a great many (in fact almost all) so called diseases that the medical men and other specialists have not been able to do much for in the way of curing, this system gives a permanent cure. We prefer those who

judgment of the Court below must be reversed, and the cause remanded for a new trial. It is so ordered. All the Justices concurring, except Garber, J., not sitting.

INDICTMENT AGAINST ADVERTISING PHYSICIAN FOR PRACTICING WITHOUT A LICENSE.

STATE vs. WILHITE, 109 N. W. 730, (IOWA) NOVEMBER 1906.

The indictment charged that the accused did willfully and unlawfully practice medicine, and then and there did publicly profess to cure and heal the diseases and ailments to which the flesh is heir by means of a certain system, a more particular description of the peculiar and mysterious workings of which are to this grand jury unknown; that said J. C. Wilhite then and there did advertise in the Ft. Dodge Messenger that by said system he could cure and heal tuberculosis, and cause the same to be cured, and did advertise in said paper that he is a doctor of neurology and opthalmology with an office at No. 526½ Central Avenue in Ft. Dodge, Iowa, with office hours from 9 to 12 and 1:30 to 4:00, that said Wilhite did then and there maintain such office, and had placed near the entrance to such place an advertisement sign containing the words: "Dr. Wilhite, Neurologist," and by means of such advertisement did solicit persons to meet him at his office to participate in the beneficent results arising from treatment under his system; that said J. C. Wilhite did then and there undertake to cure and heal diseases and ailments, and that said J. C. Wilhite then and there did not have a certificate nor a license from the proper authorities so to practice, nor did he file with the County Recorder of Webster County, Iowa, any such certificate to practice, and never applied therefor. The defendent was convicted and appeals. Affirmed.

LADD, J. Before the trial the defendant objected to the indictment on three grounds: (1) For that he did not charge any offense under the laws of the state, (2) it was so indefinite as not to inform the accused of the charge against him, and (3) it attempted to charge several distinct and separate offenses. Though inartistically drawn, it is not open to any of these criticisms. It specifically alleges that the defendant practiced medicine, then averred his acts which constituted so doing, and that this was without certificate from the proper authorities. It may be that his acts were set out with more particularity than was essential, but at the most this amounted to no more than pleading evidence. Section 2580 of the Code provides that "any person who * * * shall practice medicine, surgery, or obstetrics in this state without first having obtained and filed for record" a certificate from the state board of medical examiners, shall be punished. Section 2579 of the Code declares that "any person shall be held as practicing medicine, surgery or obstetrics, or to be a physician, within the meaning of this chapter, who shall publicly profess to be a physician, surgeon, or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal." Here follow certain exceptions not involved in this case. The evident object of the pleader was to allege acts of the accused which would bring him within the definition of the section last quoted. To accomplish this the indictment alleges (1) that he publicly professed to cure and heal by means of a system unknown to

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have tried other systems. In that way we prove the system I practice is the best because we get good results. We do not care what your troubles are, if you want to get well and stay well. Dr. J. C. Wilhite, 526½ Central Avenue, Fort Dodge, Iowa." This was a public profession to cure and heal. State vs. Heath, supra. Publishing his card as a "doctor of neurology and ophthalmology" was also a public profession that he was a physician and, this, with the assumption of duties as such, by advising patients how to care for themselves, so that nature might effect a cure, constituted practicing medicine within the meaning of the statute. See O'Neil vs. State, 3 L. A.R. (N. S.) 762, and note.

5. Appellant complains that if he be adjudged guilty there are others equally so, and many are enumerated who, as counsel seems to think, must come beneath the ban of the law. It will be time enough to determine each case when it reaches us, and should some escape it may afford the accused some consolation to reflect that also at the fall of the tower of Siloam those who escaped were quite as great sinners as the eighteen who were crushed beneath its walls. At any rate the zeal of the prosecutor was not misdirected in the case at bar. The "doctor" left the farm in 1902, and after studying at the "Northern Illinois College of Ophthalmology and Otology" two months, was awarded the degree of "doctor of optics." He then pursued a correspondence course in the same school during the summers of 1902 and 1903, and became entitled to a "master diploma" upon the payment of $10.00. Thereafter, he took a regular course of three months at the "McCormick Neurological College" and became a "Doctor of Neurology" March 1, 1905. Aside from this he has read several articles in the magazines, and a couple of works on the eye. No argument is required to demonstrate that his preparation was utterly inadequate, and that his pretensions savored of the charlatan and imposter. Even though familiar with his alleged "system" he could not have been reasonably proficient in those subjects essential to the appreciation of physical conditions to be affected by treatment. The design of the law is not to render any mode of treatment whatsoever unlawful but that every one, before he shall undertake to prevent, cure or alleviate disease and pain as an occupation shall, have some knowledge of the nature of disease, its origin, its anatomical and physilogical features, its causative relations, and of the preparation and action of drugs. Experience shows that this is necessary for the protection of the people against fraud and empiricism. No one is thereby deprived of the opportunity to exploit his "system." All that is exacted is that, before undertaking to do so by applying it to the functions of life, he shall be possessed of that degree of knowledge and skill required by the statute of all, and evidence of a certificate from the proper officers of the state.

The judgment is affirmed.

DENTISTRY.—EVIDENCE SUFFICIENT TO SUSTAIN FINDING OF NEGLIGENCE IN ALLOWING TOOTH TO PASS INTO PATIENT'S LUNG.

McGeehee vs. Schiffman, 87 Pac. 921, (Wash.) December 1906

Allen, J. Action to recover damages on account of injuries sustained through negligence. Judgment for plaintiff, new trial denied, and defendant appeals from such judgment on the roll, and from an order denying a new trial.

The first contention of the appellant is

that the complaint, which alleges that "the defendant did then and there extract seven of said teeth and remove all of the same from her mouth excepting one of said teeth, which by said defendant's carelessness, negligence, and unskillfulness, was permitted and allowed by him to drop and pass into plaintiff's right lung, without any fault or negligence on her part," was insufficient, in that the negligence averred was not the proximate cause, for the reason that it is manifest that plaintiff, having control over her own muscles and breathing apparatus, the tooth by any negligence or omission of defendant could only have been allowed to escape into the mouth, and that it should reach the lung comprehended action on plaintiff's part which would be the proximate cause of injury; that, if there was an unbroken sequence of events through which the injury was chargeable to defendant, those continuous events should have been pleaded; that the complaint was uncertain, in that it can not be ascertained "how or in what manner any carelessness on the part of the defendant occasioned the injury, nor how the defendant by any act or omission of his could permit or allow the plaintiff's tooth to drop or pass into her lung. It is sufficient to allege the negligence in general terms, specifying, however, the particular act which is alleged to have been negligently done. "Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises. * * * It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself." Stephenson vs. Southern Pac. Co., 102 Cal. 148, 34 Pac. 620. When we consider that the demurrer admits that through want of care defendant allowed the tooth to drop into the lung, whereby the injury followed, it removes from consideration the possibility of any intervening facts or circumstances being the proximate cause of the injury. "It is sufficient to say it was negligence done, without stating the particular omission which rendered the act negligence. But it must appear from the facts averred that the negligence caused or contributed to the injury." Smith vs. Buttner, 90 Cal. 100, 27 Pac. 29. In the complaint under consideration it is averred that he dropped the tooth into the lung. The dropping of such tooth is admitted to have been occasioned through want of care. Nor can a court say, as a matter of common knowledge, that the fact admitted was impossible without some other agency acting upon it. We regard the complaint as sufficient, and in no sense as ambiguous and uncertain.

Upon the appeal from the order, it is contended that there is no evidence in support of the finding of the Court that defendant was negligent, or that such negligence caused the injury. There was evidence tending to show that defendant undertook for a consideration to extract certain teeth; that preliminary thereto he administered an anesthetic from which plaintiff was rendered entirely unconscious, and that four teeth were extracted; that thereupon plaintiff was placed a second time under the influence of the anesthteic, and defendant undertook the extraction of three other teeth; that when plaintiff regained consciousness she was strangling and coughing as though she were choking, and she felt as if some foreign substance had gone through her windpipe; that she continued this coughing and became sick; that an abscess formed in the lower lobe of the lung, and quantities of yellow pus were expectorated; that her condition was such as might be expected to result from a

foreign substance in the lung; that afterwards during a fit of coughing, she expelled from her lung a tooth. It appears further that plaintiff was in perfect health before she entered defendant's office to have such teeth extracted; that from that day she began to be sick, and thereafter was continuously under the care of a physician; that after the tooth was expelled, though in a weak condition, she began to improve. It was further in evidence that by the use of ordinary care the extractor could keep the mouth of the patient clear of blood and, in case a tooth should escape from the forceps, as is frequently the case, he is able to remove it; that constant care is necessary to be excersize that teeth may not escape into the trachea; that a skillful operator keeps track of the teeth as extracted and knows when he has taken them all from the mouth, and examines the teeth actually extracted to see that no fragments are left in the mouth; that in the exercise of ordinary care the operator could discover whether any of the teeth or fragments thereof had not been removed from the mouth. It further appears that a tooth slipping from the forceps may pass into the lungs; that the use of nitrous oxide as an anesthetic would increase the possibility of a tooth escaping from the mouth into the windpipe. There is no evidence in the record that defendant took any of the precautions before mentioned, or made any observance to see whether or not he had completed his task. In addition to all this there was evidence tending to show that ordinarily a patient regaining consciousness will not cough; that if coughing and strangling ensues after consciousness is regained it is recognized as an evidence of the fact that a foreign substance has escaped, and that unusual and great precautions are thereupon taken by the operator to cause its immediate removal; that, notwithstanding plaintiff's coughing and giving every evidence of having some foreign substance in her windpipe, no attention was paid to her by the defendant, and no effort was made to ascertain the cause of her unusual condition. There was therefore competent evidence tending to establish the averments of the complaint, not only as to the negligence, but as to the proximate cause of the injury. Nor can we say that there was established any intervening act of plaintiff, voluntary or otherwise, which contributed to such injury. We think therefore, that there is evidence in the record sustaining the findings of the court that defendant carelessly and negligently permitted and allowed a tooth to drop and pass into and down plaintiff's windpipe, and thence into plaintiff's right lung, without fault upon her part, by reason of which plaintiff was damaged.

There is no prejudicial error apparent in the record, and the judgment and order are affirmed.

We concur: Grap, P. J.; Smith, J.

JUDGMENT BY DEFAULT FOR FEES DOES NOT BAR SUBSEQUENT ACTION FOR MALPRACTICE IN IOWA.

Conway vs. Scanlan, 109 N. W. 300 (Iowa) November 1906.

Sherwin, J. The judgment sued on herein was obtained against both dedants on default in South Dakota, and was based on an account for medical services rendered the defendants by the plaintiff. In the present action the defendants filed separate counterclaims for malpractice in treating Mrs. Scanlan at the time the debt for medical services was incurred. The trial court held that

there had been an adjudication of these claims for damages in the rendition of the default judgment in South Dakota.

It was error to so hold. As we have said the defendants did not appear to plead in that action, and while there is a conflict of authority on the question in other jurisdictions, this court has held directly contrary to the appellee's contention and the holding of the trial court. Jones vs. Witousek, 114 Iowa, 14, 86 N. W. 59; Folsom vs. Winch, 63 Iowa, 477, 19 N. W. 305. See, also, Whitesell vs. Hill, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830. The cases relied upno by appellee are not in point. In Doyle vs. Reilly, 18 Iowa 108, 85 Am. Dec. 582, the question was one of payment, pure and simple, and decision was expressly limited thereto. In Barrett vs. Blackmar, 47 Iowa, 565, the suit grew out of a failure to claim for rents and profits of real estate in an action to redeem from foreclosure sale. We held that it was the nature of the payment, and hence the case was analogous to the Doyle case.

We are content with the rule announced in the two cases cited in the support of this opinion, and see no occasion for further discussion of the question. The judgment is reversed.

Reversed.

Point Three

Malpractice protection, over and above every other form of protection, **must be good,** must **prevent** all annoyance in the vast majority of cases or it has failed of its purpose and you have wasted your money. Therefore, certain it is that what you get for the sum you pay rather than the amount paid determines the bargain.

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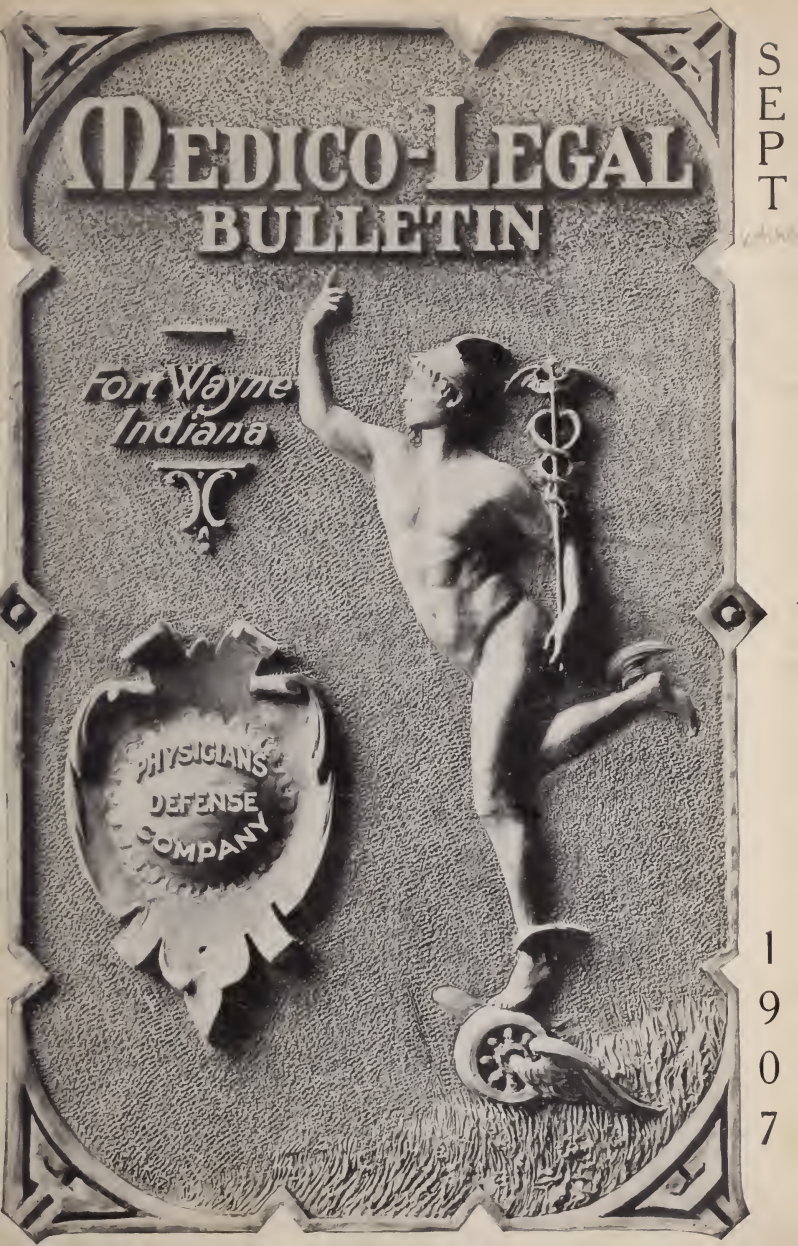
MEDICO-LEGAL BULLETIN

Fort Wayne Indiana



SEPT

1907

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 4 SEPTEMBER 1907 NO. 12

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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In Consideration *of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the* _____ *day of* _____ *of each year during the life of this contract,*

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hereby agrees to defend the legally qualified Physician,

_____ *of the City of* _____, *County of* _____, *State of* _____ *against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding* FIVE THOUSAND DOLLARS *in defense of any one suit, nor exceeding in the aggregate* TEN THOUSAND DOLLARS *in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—*

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Indiana, of any suit brought, or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, or copies thereof; together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof, that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the above mentioned sums shall have been expended to said defense, providing, that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof.

Each consecutive full years' renewal of this contract shall add five per cent. (5%) of the principal sum to the amount for the defense of any one suit, and to the amount for the defense of any number of suits within one year, conformably with the table of accumulations endorsed hereon, but, such addition shall never exceed fifty per cent. (50%) of the aforesaid principal sums

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Indiana, or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

(SEAL)

Miles F. Porter M. D.
President

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Secretary

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If connected with a firm, the style is.....

I graduated from the..... in the year.....

I practice under the..... School of Medicine, and have been duly Registered and Licensed to practice in this County, and under the laws of this State, and am a member in good standing in the .....

.....

I do not own or maintain a hospital or sanitarium, except as follows:

Name..... No. of beds.....

I agree that this Contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph when demand is made or suit commenced for damages, and to immediately forward by mail any summons served, copy of the complaint filed, a history of the case and of the services rendered as per instructions from the Home Office, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance, not pecuniary, in defense of the case, without charge to the Company.

Date.....190.... Applicant's Signature.....

MEDICO-LEGAL BULLETIN

VOL. 4 SEPTEMBER, 1907 No. 12

TO WHAT COMPENSATION ARE PHYSICIANS ENTITLED WHEN CALLED AS EXPERT WITNESSES?

The subject of expert testimony, its value and its abuses, is just now receiving even more than its usual amount of consideration and discussion. One of the elements of the problem which apparently is not clearly understood either by the Medical or the Legal Profession is the right of the expert witness to demand larger fees than those provided by the statutes of the various States for ordinary witnesses.

Most of the writers on Medical Jurisprudence have argued that the special information imparted by the medical or other expert witness entitles him to an extra compensation and have assumed that the law agrees with their conclusion. Those authors, who have not been quite so dogmatic on the question have nevertheless stated that it is a disputed question of law and that the Courts are evenly divided upon the subject. In consequence of such text-book statements, and of other authorities to be noticed later, it is proposed to set forth some of the decisions which have been relied upon.

The earliest English case found upon the subject, is that of Webb vs. Page, decided in 1843. In this case a witness was called for the Plaintiff to speak as to the nature of the damage sustained by certain goods, and the expense that would be necessary to restore the injured articles The witness demanded compensation as an expert before testifying, and the Court granted this, saying: "There is also a distinction between a witness to facts and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound as a matter of Public duty, to testify to facts within his knowledge; the latter is under no such obligation and the party who selects him must pay him for his time before he will be compelled to testify."

So also in the case of Parkinson vs. Atkinson, 31 L. J. n. s. C. P. 199, the master had allowed the expenses of an attorney who was called as a witness on the higher scale allowed to professional witnesses. Earle, C. J. said: "We do not approve of the rule which is said to prevail in criminal cases that if a surgeon is called upon to give evidence *not* of a professional character, he is only to have the expenses of an ordinary witness. We think the master was quite right in allowing the expenses of this witness on a higher scale."

The earliest American case which is relied upon to sustain the higher rate of fees for expert testimony, is "In the matter of Roelker", Fed. Cases 11995. In this case during the trial upon an indictment, the District Attorney moved for a capias to procure a witness who had been subpœnaed to testify as an interpreter. Sprague J., said: "That a similar question had heretofore arisen as to experts and he had declined to issue process to arrest, in such cases. When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend, as a witness. In this all stand upon equal ground. But to compel a person to attend, merely because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in

every cause in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the District, and give his opinion in every trial in which a medical question should arise. This is so unreasonable, that nothing but necessity can justify it. The case of an interpreter is analogous to that of an expert."

Another case which is usually cited is that of the People vs. Montgomery, 13 Ab. Pr. Rep. n. r. 207. The Court said with reference to the propriety of the district attorney paying a medical expert for his attendance: "The District Attorney, it is rtue, might have required the attendance of Dr. H. on subpœna; but that would not have sufficed to qualify him to testify as an expert. He would have met the requirements of the subpœna if he had appeared in Court when he was required to testify, and given proper impromptu answers to such questions as might have been put to him in behalf of the People. He would not have been required under process of subpœna to examine the case and to have used his skill and knowledge to enable him to give an opinion upon any point of the case, nor to have attended during the whole trial and attentively considered and carefully heard all the testimony, in order to qualify him to give a deliberate opinion upon such testimony as an expert witness in response to the question of the sanity of the prisoner."

The same question came before the Supreme Court of Indiana, in 1877, in the case of Buchman vs. State. In this case the question calling for professional information was replied to by the witness, who had been subpœnaed on behalf of the Defendant in a Criminal trial, as follows: "The answer that I would have to give would depend upon my professional knowledge of the subject, and I respectfully refuse to give my professional opinion without being compensated." The trial court being of the opinion that the witness was required by law to answer the questions without compensation other than ordinary witness fees, committed the witness for contenpt. The Supreme Court, after giving the matter full consideration decided that both upon general principles of law, and upon the provisions of the Constitution, the physician was entitled to demand and receive extra compensation before testifying. Judge Worden, who delivered the opinion of the Court first reasons that the knowledge and learning of the physician are property quite as much as tangible goods and chattels, and then decides that, under the provision in the Constitution that "no man's particular services shall be demanded without just compensation," the demand that a physician impart his learning as a witness for the ordinary witness fees, would be in derogation of his constitutional rights. In reaching this conclusion the Court follows and relies upon an earlier Indiana case, in which it was held that, under the provision of the Constitution above set out, an attorney who was appointed to defend a pauper might legally refuse the appointment.

Another case coming up and decided at the same time as the Buchman vs. State case, was that of Dills vs. State, 59 Ind. 15. The decision of this case was the same as in the former case, but it is to be noted that in each case the opinion of the majority of the Court was dissented from by two of the Judges and that the only opinion which appears in the report of the Dills' case is the dissenting opinion of Chief Justice Biddle.

These are the leading cases upon which

those authors who claim that experts are entitled to more than statutory fees, generally rely. There are one or two other English cases to the same effect, and one case decided by the United States District Court which is not reported in the official reporter.

A careful examination of these decisions shows that most of them cannot be regarded as entitled to much weight. With regard to the English authorities, it is to be noted that there was a statute enacted in the time of Elizabeth, which provided that a witness must "have tendered to him, according to his countenance or calling, his reasonable charges." In other words, witness fees were to be proportioned to the supposed value of the witness's time, and it was considered that the time of attorneys, physicians, and other professional men was of more value than the time of the ordinary merchant or workman. Under this construction, it was held that the physician was entitled to compensation on the higher scale, even though called to testify as to facts alone and not as to opinion and undoubtedly it was due to this statute that the English Courts were so quick to recognize the claim of expert testimony for extra compensation. Moreover, the English cases above cited have been criticized by Judge Tindal in the later case of Lonergon vs. The Assurance Co., 7 Bing. 729. With regard to the New York case of People vs. Montgomery, an examination discloses that the case does not really hold anything more than that an expert witness is entitled to extra fees for unusual services, such as attending the whole trial and listening to all the testimony. It does hold in effect that a physician would have to attend and testify upon subpœna for the ordinary witness fees, unless some such unusual services were required of him. As above indicated, the Indiana Court arrived at its conclusion by depending upon the analogous decision in that State, that an attorney could not be compelled to defend a pauper criminal, unless compensation was promised him, and in this doctrine the Indiana Court stands almost alone. It may be added that the rule as laid down in these Indiana cases was shortly thereafter changed by a Statute which provides that: "A witness who is an expert * * * may be compelled to appear and testify to an opinion, as such expert * * * without payment or tender of compensation other than the per diem and mileage allowed by law to witnesses." There remains only the cases decided by the Federal Courts, and what is said in the one first cited, "In the matter of Roelker" with reference to medical experts is mere dictum, as the question before the courts was as to whether an interpreter was entitled to extra fees. It is very possible that a distinction might be drawn between the services of an interpreter and the opinion evidence of a physician.

It is apparent then that there are no very conclusive authorities to sustain the proposition that an expert is entitled to extraordinary compensation, and that the rule to this effect, so often found in treatises on the subject, might well be questioned even though there were no authorities directly contradictory. There are, however, a number of authorities to that effect, some of which will be considered in detail. Among the more important are:

Ex Parte Dement, 53 Ala. 289;

Dixon vs. People, 168 Ill. 189;

Sumner vs. State 5 Ct. of App. (Tex.) 374;

Flynn vs. Prairie Co., 60 Ark. 204;

Burnett vs. Freeman, 103 S. W. 121.

The earliest and leading case on the subject is the Alabama case of Ex Parte

Dement. In this case the physician was introduced by the State on a murder trial, but refused to describe the nature and character of the wound received hy the deceased, until he had received some remuneration or promise of remuneration. The Supreme Court held that "A physician like any other person, may be called to testify as an expert in a judicial invertigation, whether it be of a civil or criminal nature without being paid for his testimony as for a professional opinion, and upon refusing to testify is punishable for contempt." And the same court continues: "And the same principle which justifies the bringing of the mechanic from his work-shop, the merchant from his store house, the broker from his change, or the lawyer from his engagements, to testify in regard to some matter which he had learned in the exercise of his art or profession, authorizes the summoning of a physician or surgeon, or skilled apothocary, to testify of a like matter when relevant to a cause pending determination in the Judicial tribunal."

This case is followed and approved by the Supreme Court of Texas in the case of Sumner vs. State. The physician who was asked to testify in this case had been called to see the deceased person and attended him until his death. After his death he made a post mortem examination. Upon the murder trial the physician was asked to state the cause of the man's death, but refused on the ground that he had learned the cause of the death through the post mortem examination, which the County had refused to pay for. The court says: A physician may be compelled to testify as to the results of a post mortem examination, and it is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty should refuse to testify in a cause pending before the Courts of his Country, involving the life or liberty of a fellow being, the rightful administration of the laws of a common country. Dr. S. has doubtless been misled in taking the position he did, by the misconception of certain writers on Medical Jurisprudence."

The latest decision upon this subject is the above case of Burnett vs. Freeman, decided by the Court of Appeals of Missouri in June of the present year. This was an action brought by a physician to recover the value of his services as an expert witness in two suits for personal injuries brought by the defendant against a railroad company. The Court after going through all the early authorities upon the question reaches the conclusion that the Physician is not entitled to more than the statutory fees and speaks as follows: "After consideration of the question in all its bearings, we have arrived at the conclusion that a witness called to testify as an expert, whether as a physician or in any other branch of knowledge, may be compelled to state his opinion upon hypothetical or other questions involving his professional knowledge without compensation other than the witness fee taxe d to the ordinary witness. It is a duty he owes to the State in aid of its orderly existence, and in return for which he enjoys its protection and the administration of its laws in his behalf, not least of which would be the compulsion of other experts, whether they be the man who practices a profession, the artisan, the artist, the tradesman, or other person, to come to his aid when needed in litigation in which he might unfortunately be involved. Indeed, in this very case the plaintiff invoked the special knowledge of his professional brethren in aid of the price he charged for his attendance upon the Court, and there was no thought of it not being

their bounden duty to give to the Court and jury, in his behalf, the benefit of their information derived through the experience and study of their profession. In England there was a statute (St. 5 Eliz. c. 9, 12) providing a penalty against the witness "who not having a lawful and reasonable lot or impediment to the contrary" fails to appear to testify in a cause after process served upon him, "and having tendered unto him or them, according to his or their countenance or calling such reasonable sums of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf." It is possible that such statute has had its influence in the course of Judicial decision, and has fostered distinctions that would otherwise not have obtained. Distinctions did exist at the date of that statute, and before and since its enactment, so that a witness in high social, official, or professional life was thought to require more for his expense in attendance upon the Court. These have largely disappeared, though we find that, as to the professions of law and medicine, they have remained with sufficient tenacity to influence claims for extra compensation from persons practicing those professions to this day. * * * These considerations, while not affecting the question whether a physician is entitled to compensation on the ground of performing service for the party calling him, yet explain, to some extent, why it is that there has grown up an idea that an expert in medicine, surgery, or law should be entitled to compensation for stating his knowledge of those professions upon the witness stand, when rarely a claim is made for the innumerable calls for expert evidence from other avocations."

The same conclusion has been reached by the Supreme Court of Colorado, Arkansas, Minnesota, Illinois, and Pennsylvania, and it is to be noted that this holding applies not only to testimony before Courts of Record, but also to the appearance before a Coroner. Thus, in the case of St. Francis County vs. Cummings, 55 Ark. 419, the Court decided that the Coroner might summon a physician and compel him to swear to his opinion on a superficial view of the body, but could not compel him to touch it or to open it, as such an act was not within the office of a witness.

These decisions do not, of course, affect the physician's right to demand extra compensation for services not properly comprised within the meaning of witness' services. Indeed this construction is expressly excluded in most of the cases referred to. In the case of Ex Parte Dement, the Court says: "Nothing we have said is intended to support the proposition that a physician or surgeon could be punished as for a contempt for refusing, unless paid therefore, to make a post mortem examination, or undertake any other operation, requiring skill and special professional training, in order to qualify himself, when desired by the Court so to do, to testify in a cause." And it is said by the Court of Appeals of Colorado, that a physician could not be legally required to analyze the contents of a stomach or perform any other operation or make an examination for the purpose of testifying.

In the case of Burnett vs. Freeman the further question is brought up as to whether a contract to pay an expert witness extra compensation is binding, and the Court decides that such an agreement has no binding effect for two reasons in the first place, for the reason that it is without consideration, being merely an agreement to do something which it was the witness' legal duty to do, and in the

second place that such an agreement is against public policy. The Court says: "But Plaintiff also put his right to a judgment upon another ground, distinct from the first; and that is, that defendant agreed to pay him a compensation for his services as an expert witness. In our opinion a contract would be valid to pay an expert witness for any service which the law does not compel him to do as a witness free of charge, as already pointed out. For all such service he is entitled to claim compensation; but an agreement to pay such expert (whether doctor or lawyer) for being a witness as to those matters which we have held the law and his duties as a citizen require him to testify to, would be invalid. As already stated, he is in such respect on the same plane with any other witness, and the agreement would be without consideration, and it would be against public policy." This case undoubtedly represents the law on this question in any Jurisdiction where it is held that a physician is compellable to testify as an expert without extra compensation. For still stronger reasons it has been held that an agreement by which a person is to be paid a stipulated sum for giving his expert testimony on the condition that it enables the other contracting party to win the suit, is against public policy and invalid.

In a number of the States this subject of the remuneration of expert witnesses has been dealt with by Statute. Thus the Louisiana Code empowers the Court to determine whether the witnesses have been called as experts and what compensation they are entitled to receive. The Iowa Code provides that expert witnesses shall receive additional compensation to be fixed by the Court. The North Carolina Code is to the same effect, as are also the Minnesota and Rhode Island Statutes. In Indiana, as above stated, the contrary is provided by Statute.

The present condition of expert testimony, and particualrly medical testimony is so unsatisfactory, and the complaints against its venality and lack of credibility are so frequent, that it is probable there will be more and more demand to remedy the matter by legislative action. In considering the question as to what attitude the Legislature should adopt toward the question of extra compensation, it is proper to give some attention to the reasoning of the Courts of the Common Law in arriving at the decisions discussed above. The grounds upon which the right has been upheld have been three in number: The first ground is that the time of the expert witness is more valuable than the time of ordinary men, and that, by attendance at Court, such a witness meets with a loss of time. The second ground upon which the claim is based is that the skill and accumulated knowledge of the expert are his property and that a man's property should not be taken without just compensation. The third ground is the great inconvenience which would result to physicians and surgeons from their liability to be called upon in every cause in which any question in their department of knowledge is to be solved.

In reply to the first reason above, it is evident without argument that a professional man's time cannot justly be asserted to have greater value than the time of persons engaged in numerous other pursuits. Moreover, even if it were true that his time is of somewhat more value, that would not justify such a great difference as exists between the statutory witness fees and the amount charged for expert testimony. More recent authori-

ties both in England and this country hold that the right to such extra compensation can not be properly based upon loss of time.

As a criticism of the second ground given above, it is only necessary to quote the language of the Court in the case of Dixon vs. People: "It is not exactly accurate to say that the mere abstract knowledge acquired in the study of a special employment is of itself property. It is the right to apply that knowledge to the accomplishment of a particular result which constitutes property. * * * Where a physician is asked a hypothetical question, and is called upon to give his opinion upon the facts stated in the hypothetical question while he is testifying as a witness in court, he is not thereby required to practice his healing art. He is merely making a statement for the purpose of enabling the Court and the Jury to understand correctly a case which is before the Court. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is not so much whether knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. * * * It is the duty of the ordinary witness and of the expert witness to testify as to facts within his knowledge which bear upon the decision of controversies in the courts."

In the third reason assigned, that of the oppressive inconvenience resulting to an eminent professional man, there appears to the writer to be more of weight than in the preceding grounds. It is probably true that there is little danger of any physician or surgeon in cities of moderate size being compelled to spend a considerable portion of his time upon the witness stand. But in the larger cities, it may be easily conceived that a physician might acquire so great a reputation in some line of practice, as to render him liable to very frequent calls from the attorneys who are acquainted with his ability as an expert witness, and the result might be to deprive him of valuable time, to an extent far greater than that to which the ordinary citizen is liable in consequence of his duty to serve at a witness. Moreover, it is almost the universal custom, except in cases in which a member of the medical profession is a party litigant, for medical experts to demand and receive compensation, and it may well be that it is proper in view of this custom and of the possible injustice suggested by this third reason for the Legislature to provide for the payment of special compensation to the medical expert.

Many methods of remedying the abuses of expert testimony through legislative action have already been suggested. Thus Judge Redfield in his work on wills suggests "This class of witnesses should be selected by the Court and this should be done wholly independent of any nomination, recommendation or interference of the parties, as much so to all intents as are the jurors. To this end, therefore, the compensation of scientific experts should be fixed by Statute or by the Court, and paid out of the public treasury and either charged to the expenses of the trial as part of the costs or not, as the Legislature should deem the wisest policy." And it has been more lately suggested by Judge Woodward of the Appellate Division of the New York Supreme Court, that the Judges of the Trial Courts should select a certain number of the physicians or surgeons in their locality whose honesty and ability insures their making efficient expert witnesses, should allow no other physicians or surgeons to be selected by litigants, and should

prohibit the payment of any larger fee than provided by the Statute dealing with expert witnesses. As said above there have been numerous other suggestions upon this subject, but there is not space here to notice more of them. The object, however, to be attained is the same in each instance; it is the procuring of a non-partisan opinion upon the subject in controversy before the courts. "The theory upon which such witnesses are required to testify is that they are amici curiæ, and that, testifying under the sanction of an oath, they so do, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the Court to pronounce a correct judgment." That the object is not attained under the present procedure is plain to all observers.

Point Two

Ninety per cent of all threatened suits **prevented** during past fiscal year.

That's Most Important

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession.

MALPRACTICE—EVIDENCE HELD INSUFFICIENT TO TAKE CASE TO JURY

NEIFERT v. HASLEY. 112 N. W. 705 (MICH.)

OSTRANDER, J. Plaintiff, a man 30 years old, was badly injured in May, 1903, by machinery. According to his testimony, his right arm was broken in three places between the shoulder and elbow, some ribs were broken, his leg was broken just below the knee, he was badly hurt about the head, and a portion of his skull was gone. Defendant, a physician and surgeon, attended him until some time in the summer, and, as plaintiff claims, was negligent and unskillful in his treatment. The declaration alleges, as improper treatment, permitting and causing the broken bones not to be placed in apposition the one to the other, the muscles, ligaments, and tendons not to be properly placed, so that they could properly adhere to their proper places by natural processes, the leg and foot caused to be and become greatly swollen, inflamed, festered, and diseased, pus permitted to accumulate and remain, so that it became and was necessary to amputate a portion of the foot. The result is alleged to be a weak, stiff, deformed arm, a crippled leg and foot. The case coming on to be tried, the court, when plaintiff's case was rested, directed a verdict for defendant. This ruling and direction is assigned as error. We are therefore called upon to review the testimony produced for plaintiff.

Counsel for appellant has directed attention to that portion of it which, he thinks, made a case for the jury. He relies upon evidence of the fact that the arm was not set until 19 days after the injury, the opinion of plaintiff that there was no reason for not setting it earlier, the statement of Dr. Reig that an arm should be set as soon as possible, if everything is in condition to do it, mentioning as a preventable condition an arm too badly brusied, the opinion of plaintiff that the arm "is not properly set." He relies, also, upon the testimony of plaintiff, to the effect that Dr. Parker said to defendant, after learning that the arm was not set: "What do you expect to get out of that? You will have a flail arm out of it." He relies, also, upon the fact that Dr. Parker advised application of heat to the leg; the argument made being that defendant did not use a well-known remedy, and neglected to apply hot water to stimulate the circulation until told to do so by Dr. Parker. There is also the testimony concerning the amputation of the toes and of the condition of plaintiff at the time of the trial. The witnesses for plaintiff were himself, his wife, and Dr. J. H. Reig. It appears that on the day succeeding the injury, when plaintiff's leg was dressed and set, two physicians besides defendant were present. Later, Dr. Parker was in consultation with defendant. When the toes were amputated, Dr. Stevens performed the operation, and

Drs. Reig Pike, and another physician were present. From Dr. Reig we get no testimony concerning the nature or extent of plaintiff's injuries, the treatment he had received, whether the treatment had been proper, the cause or causes of plaintiff's condition at the time he began treating him. His testimony warrants the conclusion that he found the tissue on and about the toes broken down and amputation of the toes necessary. In his opinion plaintiff had dry gangrene,which, he said, may be due to a bruise or to interference with circulation of the blood. Plaintiff's injuries were severe and evidently complicated. Defendant advised amputation of the leg. Dr. Parker, called in consultation, was of opinion that plaintiff had a fighting chance to save the leg. The chance was taken, with the result already stated. The argument that the court or a jury may assume that hot water application to the legs were so strongly indicated that it was negligence not to apply them is met by the argument of counsel for defendant that hot applications were clearly contra indicated as likely to induce suppuration, and that the purpose of applying them when they were applied was to hasten the sloughing off of dead tissue and to establish a line of demarcation between good and bad tissue. There is no opinion evidence upon the subject. When defendant set the arm (it had been before that stretched out between sand bags), a hole was left in the plaster cast so that a sore might be reached and treated, indicating a bruised arm. It is not claimed that plaintiff has a flail arm.

If in any case non-expert testimony of the injury, of the method of treatment adopted, and of the resulting conditions may be such evidence of negligent treatment by an attending surgeon as a jury may act upon (see Wood v. Barker, 49 Mich. 295, 13 N. W. 597; Pelky v. Palmer, 109 Mich. 561, 67 N. W. 561), this case is not such an one. And we have found, and our attention has been directed to, no testimony warranting the inference that the disabled arm of the crippled foot resulted from improper surgical treatment.

The judgment is affirmed.

WHAT CONSTITUTES A CONTRACT TO PAY FOR PHYSICIANS SERVICES — CIRCUMSTANCES DETERMINING WHAT IS A REASONABLE FEE.

(Morrell v. Lawrence, 101 S. W. Rep. 571.)

Valliant, P. J. Plaintiff sues on an alleged implied contract of defendant to pay him the reasonable value of his services as a physician rendered to defendant's adult son at defendant's request. The facts are: The defendant and his son, Frank Lawrence, both former residents of St. Louis, were at the time in question living in New York City. The son, 42 years of age, was not living with his father, but at a hotel. He was a man of considerable means, carrying on a business of his own. Plaintiff is a physician residing in St. Louis. While defendant and his son resided in this city, the latter became in bad health, and came under the care of the plaintiff. The relation of physician and patient had existed between them for several years. Plaintiff's bills for medical services rendered in St. Louis to Frank Lawrence were presented to and paid by him. In 1899 plaintiff, in St. Louis, received a telegram from defendant then in Virginia, asking him to go to some place in Michigan where his son then was sick. to minister to him as a physician, and plaintiff was on the eve of going, when he received another telegram stating that Frank had already started for his home in St. Louis. On

his arrival here, plaintiff rendered him medical services, and he paid the bill. In 1900 Frank Lawrence went to Europe, and the plaintiff went with him as his attending physician. The plaintiff testified that he did not go on that journey at the requenst of Frak Lawrence alone, but on the request also ot Dr. Lawrence, the defendant, who promised plaintiff that he would pay him or see him well remunerated for his services; that after their return from Europe, he spoke to Dr. Lawrence about paying him, and Dr. Lawrence repudiated the contract—all the pay plaintiff received for his services on that trip, lasting three months, was $1,000, which Frank paid. So much for the business relations between the parties prior to the transaction now in suit. On May 31, 1902, Dr. Lawrence and his son then living in New York and the plaintiff in St. Louis, the plaintiff received a telegram from defendant in the following words: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday via Big Four. Answer at once." Plaintiff answered June 1st: "Will leave on Big Four at noon today." He accordingly arrinved in New York on the afternoon of June 2d, was met at the station by a messenger of Dr. Lawrence, conducted to the latter's residence, and after tea was conducted to the hotel where Frank Lawrence lay very ill. Plaintiff remained in constant attendance on the sick man, ministering to him day and night, until he died July 9th. The particular character of the services rendered was in evidence, and there was testimony on the part of the plaintiff tending to show that the services were worth $300, $400, $500, and $1,000 a day. The amount of the bill sued for was $16,000, itemized at $400 a day for 40 days. The evidence on the part of the defendant was that from $4,000 to $6,000 would be ample pay for the services rendered. The verdict was for the plaintiff for $12,666. The court sustained defendant's motion for a new trial, on the ground of error in the instructions, and that the verdict was excessive. The plaintiff appealed.

1. Before we reach the points on which the trial court based its ruling, we must consider the point first presented in the brief for defendant; that is, that the plaintiff made out no case to go to the jury. The defendant's proposition is that from the facts and circumstances shown by the plaintiff's evidence the law implies no promise or obligation on the part of the defendant to pay for the services rendered. There is no express contract on the part of the defendant shown; if he is liable, it is on an implied contract. According to the defendant's estimate of the evidence, there is shown a request by defendant of plaintiff to render services for the benefit of another, and nothing more. In their brief the learned counsel quote the law as laid down in Wood on Master and Servant, † 70: "The rule is that, in order to render one liable for services rendered at his request, they must be rendered for his benefit, or under such circumstances that the person requested to render them was justified in understanding that they were for his benefit or upon his credit. But if the person performing the services knows they are not for the benefit of the person making the request, and that he is under no legal obligation to pay therefor, he cannot predicate a claim against him, unless he expressly promised to pay for them before the services were rendered." That is a correct statement of the general rule of law on that subject, but it is not of invariable application. We see no objection to applying it to the case of one calling a physician to a suffering stranger, when

there is nothing in the situation to suggest to the physician that the man calling him has any deeper interest in the case than the prompting of common humanity; and we see no objection to applying the rule to the case of a father calling a physician to wait on his son, if the son is of age and living to himself, and if there is nothing in the conditions to indicate that the father is taking upon himself anything more than the office of messenger for his son. But there is something more than the dictates of common humanity between father and son, and the fact of that relationship is to be considered in connection with other circumstances, if there are other circumstances, indicating to the physician that the father calls him on his own account to serve his son.

In an early Pennsylvania case cited in the brief for defendant (Boyd v. Sappington, 4 Watts, 247), it was held that no contract to pay for the services was implied from the mere fact that the defendant called a physician to attend his adult son lying ill at defendant's home. The evidence showed that the father had called on the physician and made the request. The physician at first hesitated. The father insisted, and the physician complied. The physician knew that the son, although living with his father, was over 21 years old, in business for himself, and had property to answer the demand. The father, when he was requesting the physician to go, stated to him that it was his son's request that he should come. It was held that out of those facts an implied contract on the part of the father to pay the bill did not arise. The court said: "There is nothing in the special circumstances relied on to take it out of the general principle; and it is very clear that, had the defendant been a stranger, however urgent he may have been, and whatever opinions the physician may have formed of his liability, he would not have been chargeable without an express agreement to pay—as, for instance, in the case of an innkeeper or any other individual whose guest may receive the aid of medical advice. A different principle would be very pernicious, as but few would be willing to run the risk of calling in the aid of a physician, where the patient was a stranger, or of doubtful ability to pay." That is the strongest case cited in brief for defendant in support of his theory on this brach of the case. Except for the fact that in that case the sick man was the defendant's son, there was nothing to distinguish it from the case of calling a physician to the aid of a stranger under his roof. The physician called was within the field of his daily work. There was nothing unusual in the call. In Crane v. Baudouine, 55 N. Y. 256, the patient was the defendant's daughter, a married woman living with her husband separate from her father's family, and when taken sick had come to her father's home to be under the care of her mother. The father had not requested the physician's attention to his daughter, but received him when he came, conversed with him about the case, and knew the extent of the services rendered. The court held that the father was not liable for the physician's bill. Edelman v. McDonell, 126 Cal. 210, 58 Pac. 528, is also referred to. In that case the physicians had undertaken the treatment of the defendant's son at his request, and after they had begun to render their services the father made statements to them that induced them to believe that he intended to pay the bill, and they stated that they relied on those statements and gave credit to both father and son, and the suit was against both. It did not appear in the evidence what services were rendered after the alleged

statements of the father, or their value. The court held that the contract was that of the son; that the alleged statements of the father were not in writing, and he was not bound. In Rankin v. Beale, 68 Mo. App. 325, there was testimony pending to show that a father had requested the physician to attend his son, 23 years old, then sick in the father's house, and that after the services had been rendered the father promised to pay for the same. There was testimony on the other side contradicting this. The court instructed the jury to the effect that, although the son was over 21 years of age, yet if he was sick in his father's house, and the father requested the physician to attend him, or if the father stated to the physician that he would pay the bill, then he was liable. That instruction directed a verdict against the father either on an implied agreement resting alone on the father's request to the physician to attend his son, the express undertaking on a promise to pay after the services had been rendered. The court held that the mere request did not imply an agreement to pay, and that the promise made after the services had been rendered was nudum pactum.

From those decisions the learned counsel citing them draw the conclusion that a promise to pay the bill is not implied from the fact that a father calls a physician to attend his sick son, who is a man of mature age, and to that evtent we think the conclusion is justified; but we do not go with the counsel to the extent of holding that a father calling a physician to attend his adult son can be rendered liable only on an express contract, because we hold that the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered. Whilst the calling of a physician to the bedside of a sick man has in the nature of the case its own elements of exception to the general rule, yet it is not put so far in a class to itself as to exempt it entirely from the category of implied contracts. Whether the facts of a case are such as to present a question of whether or not a contract may be implied is sometimes a question of fact, and sometimes one of law. If in the facts relied on, taken as true, there is nothing to justify the inference the court will so decide as a matter of law; but if they are such as that if credited the inference might or might not legitimately be drawn, it is a question of fact. We think the evidence for the plaintiff in this case tends to prove a condition of affairs from which the triers of the fact, if they should see fit to draw the inference, might with reason do so, that Dr. Lawrence intended the plaintiff to understand, and the plaintiff did understand, that he would pay for the services which the telegram called the plaintiff to render. This was not a call on the plaintiff for services in the field of his daily work. It called him away from his established field of action. It called him, in effect, to resign his practice, to dedicate himself for the time being tolely to the service of the defendant's son, whatever the consequence might be to his general practice. This is altogether outside of the category of the cases above referred to. The patient was not one of 20 or more for whom the physician might prescribe in a day. He was one for whom the physician must give up all other patients. The call was a very unusual one, and it involved unusual financial consequences.

The plaintiff had made a trip to Europe in professional attendance on defendant's son, and, according to his testimony, he

had undertaken that journey, partly at least, on the request of defendant; but, when they returned, defendant denied that he had made the request, and refused to recognize the obligation. The testimony on that point was meager, but it indicates that on the return from the trip to Europe there was a misunderstanding between plaintiff and defendant as to the liability of the latter for the services rendered on that occasion; the defendant denying that the trip had been taken at his request, and the plaintiff did not press the point. The matter ended with plaintiff's receiving from Frank Lawrence a sum of money which he regarded as inadequate. After that came the transaction now under consideration, in which there is no room to question at least one fact; that is, that the plaintiff went to New York and entered upon this service at the request of the defendant. The telegram was not couched in form of a message from the sick man. The writer was not in the character of the conveyor of a request from another, and did not assume to express merely another's wish, or merely make the announcement that there was a sick man there needing attention. He expressed his own desire, uniting his own with that of his son, or possibly of some other member of the family, under the first person plural of the pronoun: "Frank is quite sick. We would like to haye vou come and treat him. Leave on noon train Sunday via Big Four. Answer at once." If the plaintiff's testimony gives the correct version of the controversy or misunderstanding as to the defendant's liability for the serveces rendered on the trip to Europe, Dr. Lawrence should have known that the plaintiff would understand that telegraw as carrying by implication a promise to pay, or at least that he was liable to put that construction on it. The telegram is to be interpreted in the light of the relation of the parties and of their past transactions with each other. Whether in that light the defendant had reason to believe that the plaintiff would understand the telegram to imply an agreement to pay, and plaintiff did so understand, were questions for the jury under proper instructions, and, if the jury should so find, the verdict should be for the plaintiff.

2. It was shown in evidence, over the objection of the defendant, that he was a very wealthy man, and on the measure of damages the court in its instructions authorized the jury to take that fact into account. The instructions covering that point were as follows: "(2) In determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account the circumstances and conditions under which the services were rendered, the length of time employed, the professional character and standing of plaintiff, the absence of plaintiff from his residence and place of business, the nature of the ailment of the patient, the nature of the services themselves, the danger, if any, of infection or contagion incident thereto, the professional skill and experience required for their proper rendition, the ability of the person liable therefor to pay, together with all other facts and circumstances shown in evidence, relative to such services; and, having considered all such facts and circumstances, the jury should fix the value of the services at such an amount as under all the evidence they believe to be reasonable and proper. (3) The jury are instructed that the evidence touching the financial ability of the defendant may be considered by the jury, not to enhance the fees above a reasonable compensation, but solely to determine whether the defendant, if they find,

under the other instructions, he is liable at all, is able to pay a fair and just and reasonable compensation for the services rendered to his son." The trial court sustained the defendant's motion for a new trial on the ground partly that those instructions were erroneous. In that ruling the court was correct.

We are referred to some decisions as sustaining the proposition that the fact that a man is amply able to respond to a judgment for a debt sued for is one to be taken into account in determining the amount to be awarded against him; but to the extent that those cases so hold, we do not agree with them. Among those cited are two Missouri cases (Hurt v. Jones, 105 Mo. App. 106, 79 S. W. 486, and Ryans v. Hospes, 167 Mo. 342, 67 S. W. 285), but we do not understand those cases as so holding. Hurt v. Jones is only authority for saving that evidence showing a custom of trade fixing the value of the services of a real estate agent negotiating a sale at 20 per cent. of the value of the property sold was admissible. The ability of the defendant to pay was not brought into question. In Ryans v. Hospes the plaintiff sued for the reasonable value of his services as a nurse rendered to defendant's testator in his lifetime, in his last illness. The defendant himself introduced the evidence of the value of the estate, and made the fact of the testator's great wealth the basis of an argument that a presumption of payment must be indulged. There was no instruction to the jury to take into account the wealth of the testator in assessing the reasonable value of the services. The amount awarded in the verdict was within the value testified to by the plaintiff's witnesses, and there was no evidence for defendant tending to show that that estimate was excessive. In commenting on the amount of the verdict, the court used the language quoted in the brief of plaintiff's counsel that: "While the verdict would be large for such services rendered a person of ordinary means, it must be borne in mind that Dr. Bradford was a man of very great wealth; that he had no family to bear a portion of the burden of nursing him in his afflicted old age," etc. That language was not used in deciding any question at issue in the case, and it seems rather to relate to the nature of the services; that is, the exclusiveness on the plaintiff of the burden of nursing. But, however that may be, the question we are now to decide was not in the case. In a case of this kind, if the plaintiff is entitled to recover at all, he is entitled to recover the reasonable value of the services rendered. He is entitled to a verdict for the reasonable value of his services, although the defendant may be a poor man. He is not entitled to a verdict for more than the reasonable value of his services, although the defendant may be a man of great wealth. The jury, in a case of this kind, have no concern with the question of the defendant's ability to satisfy the judgment.

Ward v. Kohn, 58 Fed. 462, 7 C. C. A. 314, is cited in the brief for plaintiff. There the court commented on the well-known practice in our profession of charging a poor man less for legal services rendered than those services are worth, and, on the other hand, of charging a wealthy client a full, fair and reasonable compensation, and the court said: "The fees the attorney deserves from such a client should not be measured by the inadequate compensation and small fees the gentlemen of the bar usually receive from those who are unable to pay at all, or to pay a fair compensation; but they should be measured by the fees usually obtained by attorneys for like services

from those who are able to pay just compensation for the services rendered." That is to say, in estimating the value of the services, the jury should not take for a standard of measurement the fees a lawyer would charge a poor man, in consideration of his poverty, but should estimate the services at their full, fair value. That is sound doctrine, as far as it goes; but it does not authorize the plaintiff to show to the jury the defendant's wealth as an element, to be taken into the account in the measurement of the value of the services, unless it is in rebuttal of evidence from the other side attempting to show the custom of a lower standard. If the defendant should introduce evidence to show that the plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plaintiff woul dhave a right to show, if such was the fact, that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. In the case at bar, there was no effort on the part of defendant to prove that the plaintiff or other physicians were in the habit of charging smaller fees for like services. Hence these was no occasion for rebuttal evidence to show that smaller fees were charged out of consideration for the poverty of the patients, and that defendant's financial condition did not entitle him to that indulgence. Instruction 3 did not cure the error in this respect of instruction 2. It justified the jury in believing that there wasa difference between the reasonable value of services rendered a rich man and those of the same kind rendered a poor man. There is no such difference.

3. Over defendant's objection, testimony went in to show that the plaintiff was a physician of good reputation in the community, and instruction No. 2 authorized the jury, in assessing the value of the services, to take that fact into account. That was error. The plaintiff's general professional reputation was not drawn in question, and the jury had no right to consider it in estimating the value of the services. The plaintiff's professional reputation in the community would doubtless have some influence on the amount of income derived from his practice, and if that was in dispute, and if he was suing for loss of income caused by absence from home in the service of defendant, evidence of that reputation would be admissible. But there was no question of that kind in the case. The plaintiff testified that his income was $6,000 to $10,000 a year, and these was no dispute of that. Besides he is not suing for compensation for loss of income occasioned by absence from home in the service of defendant. His uetition is short, and to the point. In it he says that, at the request of the defendant, he rendered professional services to defendant's son, and that the services rendered were reasonably worth $16,000. It is the value of the services alone that he sues to recover. It was competent for the plaintiff to show that he was a physician of learning and skill, and that fact should be taken as an element in estimating the value of the services rendered; but the plaintiff's general reputation as a physician had no more to do with the case than his general reputation as a man.

4. Instruction 2 is faulty, also, in this: It apparently assumes that the jury is going to find for the plaintiff and assess the value of the services in question, and the instruction is limite dalone to directions as to what the jury should take into account in making the assessment. The instruction should have given the jury to understand that, before they

would reach the question of quantum valebat, they should find for the plaintiff on the main issue, something, for example like this: "If the jury find for the plaintiff, then in determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account," etc. We do not regard this as a grave error; but, since it has been called to our attention, we pass judgment on it that it may be corrected at the retrial.

5. The court excluded evidence offered by defendant to show that the defendant.s son, Frank Lawrence, was a man of considerable fortune and amply able to pay for the services. It was error to exclude that testimony. The testimony showed that the plaintiff, the defendant, and the defendant's son were well acquainted with each other. Plaintiff knew in a general way the financial standing of the father and the son. If it had been the fact that the son was impecunious, and the plaintiff knew it, and defendant knew that the plaintiff knew it, would not that fact have naturally influenced the plaintiff in drawing the inference that the defendant intended to pay for the services he called him to perform? And, on the other hand, if it was known to both parties that the son was himself a man of considerable wealth, would not that naturally render the inference less violent? It was a fact by no means conclusive, but it was one of the many facts in the case to be taken into account and given such weight as the jury should see fit to give it.

6. The learned trial court also asigned as a reason for granting the new trial that the verdict was excessive. That is a point peculiarly within the province of the trial judge. It is one that he is better qualified to judge than an appellate court. The law puts that important responsibility upon him, and it advances the cause of justice when the trial judge courageously performs that duty. Friedman v. Publishing Co., 102 Mo. App. 683, 77 S. W. 340. We see nothing calling for a review of the ruling of the trial court on this point.

The order granting a new trial is affirmed. All concur, except Woodson, J., not sitting.

THE LIABILITY OF A RAILWAY COMPANY TO PAY FOR A PHYSICIAN'S SERVICES RENDERED AT THE REQUEST OF A STATION AGENT.

Hall vs. New York, N. H. & H. R. Co. 65 Atl. 278.

Dubois, J. This is an action of assumpsit brought to recover the sum of $1,573.75, with interest, for services rendered during a period of 20 weeks, and for supplies furnished by the plaintiff, a physician and surgeon, to the defendant's employe, a carpenter, who was injured, in the course of his employment, at its power station in Warren, R. I., by steam and hot water in an accidental explosion. The defendant denies liability and claims that it never engaged the services of the plaintiff. After verdict for the plaintiff, the defendant has petitioned for a new trial upon the grounds that the verdict is against the evidence, that the judge who presided at the trial erred in his rulings and charge to the jury, and that the amount of the verdict is excessive.

1. It appears that on December 6, 1900, the plaintiff was called to attend Jared E. Smith, the injured man, by the defendant's station agent at Warren. No evidence was introduced tending to prove his authority in the premises, but the plaintiff having caused the sufferer to be removed from the place of accident to his boarding house in Warren, having sent for the wife of the patient, who was at their home in New Haven, Conn., having

procured the services of a trained nurse to assist him, and, after attending to the immediate necessities of his patient, prepared and sent to New Haven, where the principal offices of the defendant company are located, by Mr. Vinal, the foreman under whom said Smith was working at the time of the accident, the following report:

"Warren, R. I., Dec. 7, 1900, 11:30 A. M.

"On the morning of December 6th, 1900, I was called to the power station in Warren, by Mr. Schultz, station agent, to attend to Jared E. Smith, who had been scalded by steam and hot water which came from condenser pipe. The scalds appear to be of the second degree, and involve both legs and the lower third of both thighs. The patient now suffers from prolonged shock and is much exhausted.

Nelson Read Hall, M. D.

"Miss M. C. Pine, trained nurse, is in attendance. N. R. H."

What Mr. Vinal did with the report does not appear in evidence, but at the trial the defendant produced the same and used it in cross-examination of the plaintiff. No explanation was offered in behalf of the defendant as to how or when it obtained possession of the same, and in the absence of such explanation it is not unreasonable to infer that it was delivered to the defendant with reasonable celerity. What information was thereby communicated to the defendant by the plaintiff? The facts that at Warren, R. I., on the day before its date, the physician had been called by Mr. Schultz, station agent, to the power station in Warren, to attend a person, whose name is given in full, who had been injured in the manner specifically set forth; the severity and location of the injury being technically described, and the condition of the sufferer also set out. And it is made to appear that a trained nurse is also in attendance. This was not merely an item of news to which the attention of the defendant was invited, nor was it a notice from Jared E. Smith, or in his behalf, calling attention to the fact that he was injured; it is a message from a doctor that he has been called by a station agent of the defendant to attend to, and is still in attendance upon, its severely injured employe; that he considers the sufferer his patient by virtue of that call, and has taken charge of him and placed a trained nurse in attendance. It is not a notice of services fully performed and completed, for it is not accompanied by a bill for the same. It is rather in the nature of a bulletin to the effect that an arduous surgical siege has been undertaken, with an account of the difficulties to be met and overcome. It is not contended in this case that it is beyond the power of the corporation to employ and pay for the services of physicians in case of injuries received by its employes in the discharge of their employment. But the defendant urges that: "The defendant does not owe to its injured employes the duty of providing medical treatment for them. If an employe was injured in the course of his employment and was away from home and friends, the defendant might be liable for an emergency call, but as soon as the emergency ceases the defendant's liability ceases." And that: "There was no contract on the part of the company to pay for the services of Dr. Hall to Smith. Mr. Schultz, the station agent, telephoned to Dr. Hall to attend a man who had been scalded." And also: "The doctor went with the injured man to his boarding house, and treated him there for 20 weeks. Clearly the telephone message from Mr. Schultz, if this was an employment of the doctor, was for the first visit only."

Assuming that the station agent was without any authority in the premises, or even that he was vested with authority to employ a physician for one visit only, if such were the facts, they were known to the defendant and unknown to the plaintiff. Their rules and regulations are not generally made public, and there is no evidence that the plaintiff had any knowledge concerning the actual authority of the station agent. But he did not content himself with relying upon any such authority; on the very next day he made his report to headquarters—to the source of authority. What was the duty of the defendant in the premises? To let the plaintiff remain ignorant of the truth of the invalidity of his employment in its behalf? To permit him to incur large expense and employ valuable time in a malodorous and repulsive employment in the faith that he would be compensated by a responsible company, while that company intended that he should be compelled to resort for payment to the nonresident injured mechanic, whose expenses would be greatly increased and whose resources would be greatly diminished, if not cut off, by this very accident, which would deprive him for a long time of the ability to perform his daily toil? The ordinary physician isn ot an eleemosnary institution, and, although he often does perform services for charity, it cannot be expected that he will compete with the hospitals, that are established for general public use. It was the duty of the defendant to early apprise the plaintiff of the true condition of affairs; to either disaffirm the act of its station agent in toto, or to explain the extent of his authority to the plaintiff in order to give him the opportunity to make further arrangements for treatment of the patient beyond the time of any authorized limited employment. But the defendant did neither; it neither accepted nor rejected the services of the plaintiff under his supposed employment, but it elected to remain silent. What is the effect of silence in the circumstances of the case? It is an equitable axiom that he who remains silent when it is his duty to speak ought not to be allowed to speak when it is his duty to remain silent. There is also a species of estoppel in pais known as estopped by silence, which arises in a case where a person, who by force of circumstances is under a duty to another to speak, refrains from so doing, and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice. 16 Cyc. 681. Such silence constitutes acquiescence, and acquiescence of the principal in the unauthorized acts of his principal in the unauthorized acts of his agent implies his ratification of the same. Technically, perhaps, theire s this distinction between ratification by silence and estoppel arising therefrom: ratification acts by conferring the necessary power upon the agent, while estoppel acts by preventing the denial of the fact that the agent was originally clothed with the necessary power. Hence the former is called to aid the agent, while the latter is interposed as a barrier for the protection of the innocent party in the dispute. But by whichever name it may be called, its effect is the same.

The evidence further discloses that upon two occasions, the first of which was soon after the accident, the claim agent of the defendant company and the company's physician, Dr. Eccleston, visited the patient to ascertain if he was in a condition suitable for removal to a hospital in Providence, and after examination upon each visit found that he was not. But no fault was found by them with the treatment that he was

receiving at the hands of the plaintiff. It seems unlikely that the defendant was unapprised of these visits and their results. It also further appears that on July 1, 1901, the plaintiff rendered the following bill to the defendant: "To professional services to Jared E. Smith, $1,573.75;" and that on April 23 and May 23, 1902, similar bills were sent to it. No notice of them was taken by the defendant. Similar silence was maintained concerning the bills as was observed in the matter of the report.

Whether the facts and circumstances surrounding the transaction do or no not constitute a ratification upon the part of the corporation is a question of fact to be determined by the jury under proper instructions from the court. The leading case upon this subjet is that of Toledo, Wabash & Western Railway Co. vs. Joseph Rodrigues, 47 Ill. 188, 95 Am. Dec. 484, in which it appeared that one Johnson, a brakeman in the employment of the railroad company, was run over by a locomotive and injured; that the station agent at Jacksonville, where the injury occurred, employed appellee to nurse and take care of Johnson, and told appellee that appellant would pay him for his services. Appellee performed the services and presented his bill to the station agent for payment. He wrote to the general superintendent, making a full statement of all that had been done, but there seems to be no evidence that this letter was received. After the account was rendered the general superintendent conferred with the station agent in reference to the various items, and as to whether the charges were reasonable, when the superintendent said if they were reasonable he would pay the account and made no other objections at the time. The court held, inter alia, as follows: "In this case, appellee was requested to render the service by the local agent intrusted with the affairs of the company at that station. He wrote soon after to the general superintendent informing him of what had been done. Having written in the usual course of business, we must presume that the letter was received. Again, there is no evidence that he countermanded the order, and not only so, but he, when the bill was presented for payment, recognized the validity of the contract and said he would pay reasonable charges for the services, and based his only objection upon the high prices charged. This, in our judgment, made a clear case for a recovery, for a reasonable compensation, if these officers had authority from the company to incur the liability. Whether the station agent had such power or not, the general superintendent was clothed, and necessarily must be, with large specific, as well as discretionary, powers. As his title implies, he has a general superintendence of the business affairs of the road, and we deem it but a reasonable inference to conclude that this was within the scope of these powers, and, when exercised, that the company must be held liable. The corporation is governed within the limits of its charter by the adoption of rules and regulations for the purpose. These regulations govern the action of its officers. By them they confer powers and impose duties on their various agents and officers, and by this means they exercise their franchises. These regulations are private, and not accessible to the public, and hence the difficulty of other persons showing, except by inference or circumstantial evidence, that any officer performs any act within the scope of his authority. It would therefore be unreasonable to require positive proof of such authority. That fact must be left to proof, as in

other cases. And when it is known that the general superintendent manages all the business of the road within his department, and binds the company by contracts on its behalf in regard to its general business, it may be safely inferred that such a contract as this was within ihe scope of his authority." The authortty of this case has never been doubted nor denied, but has been affirmed and approved in T., W. & W. Ry. Co. v. Prince, 50 Ill. 26; Ind. & St. L. R. R. Co. v. Morris, 67 Ill. 295; M. & O. R. R. Co. v. Taft, 28 Mich. 289; Pac. R. R. Co. v. Thomas, 19 Kan. 256; T. H. & I. R. R. Co. v. Stockwell, 118 Ind. 98, 20 N. E. 650; and in a case cited by the defendant —Sevier v. B. S. & T. R. R. Co., 92 Ala. 258, at page 262, 9 South, 405, 406— the court held: "Unquestionably, the general superintendent may ratify the conductor's unauthorized employment, and, upon notice of the injury and the employment of the physician, the general superintendent, in order to avoid responsibility, should dissent, and notify plaintiff that the company would not be responsible. But this duty does not arise, and there can be no ratification unless the superintendent is informed of the facts and circumstances of the employment of plaintiff." Whether or not the defendant ratified the act of Mr. Schultz, its station agent, in employing the plaintiff to attend Jared E. Smith, therefore, was a question of fact to be determined by the jury. As their verdict was for the plaintiff, without any special finding, it may be safely assumed that they found a preponderance of evidence satisfying them of such ratification. We cannot say that the verdict in this respect is against the evidence.

2. Although the plaintiff had rendered several bills to the defendant, beginning July 1, 1901, each showing the amount charged by him for the services for which this suit is brought, the defendant introduced no testimony tending to contradict that of the plaintiff, who went into a minute and edtailed explanation of the nature of his services, and testified that the prices charged by him for the same were reasonable. In such circumstances we are unable to say that the verdict is excessive.

In view of the conclusion to which we have arrived, namely, that the defendant had ratified the unauthorized acts of its station agent, the exceptions taken by the defendant to the admission by the court of questions concerning the duration and quality of treatment of the patient, the danger of leaving him without competent medical care, whether the plaintiff had requested the officials of defendant to furnish a surgeon in his place, and the like, are groundless, and must be overruled.

3. It was error on the part of the presiding justice to permit the plaintiff to testify, against the objection of the defendant, that it had paid him for services rendered in other cases to which he had been called by station agents and other of its officials at times subsequent to the date of the commencement of his services in the present case. The course of conduct of the defendant since the accruing of the plaintiff's present claim could not have any retroactive effect; nevertheless such error was not harmful to the defendant. There was ample evidence of the defendant's ratification of the plaintiff's employment in the case at bar which could not be unfavorably affected by the rejection of such improper testimony.

4. The plaintiff testified that he had performed certain services for the defendant and had rendered to it bills for the same, which the defendant paid.

Afterwards the defendant produced one of the bills, which was made out to one Walter Chase, and not to the railroad company. The court, against the defendant's objections, permitted the plaintiff to explain that the bill was not made out by him, but had been so erroneously made out without his knowledge by his assistant. To this the defendant excepted. The exception must be overruled; it was clearly within the discretion of the court to allow the plaintiff to explain the apparent discrepancy between his testimony and the bill produced by the defendant.

The defendant's exceptions to the testimony of various witnesses as to what Mr. Vinal saw or said with reference to the services of the doctor, or what Mr. Vinal said concerning the doctor's employment, cannot be sustained. The weakness of the defendant's case will not be found in the acts or sayings of its subordinate officials, because it is an inherent attribute of the policy of inaction and silence imposed upon the corporation by those having predominance.

5. The defendant's exceptions to the refusal of the presiding justice to permit evidence to be introduced by it for the purpose of showing the actual authority of certain of its agents with respect to the employment of a physician, and to his refusal to allow it to introduce its circular issued to its employes setting for ththeir duty and authority in case of accidents requiring the services of physicians, while meritorious, cannot avail it, because no more could be shown by such testimony than already appears, to wit, that the station agent transcended his authority in the premises in employing the plaintiff. But knowledge of that fact was early brought to the attention of the defendant. The defendant made the rule, and the rule was binding upon its employes. But the power that made it could enlarge it at its option, and did enlarge it, by ratification, as we have already shown.

The several requests to charge were, in view of the conclusion to which we have arrived, properly refused, and the exceptions to such refusals are overruled.

Case remitted to the superior court, with direction to enter judgment on the verdict.

PRACTICING MEDICINE WITHOUT A LICENSE—WHAT CONSTITUTES

STATE v. HUFF.,90 PAC. REP. 279.

Appeal from District Court, Franklin County; C. A. Smart, Judge.

Joseph Huff was convicted of a violation of the statute which forbids any one to practice medicine who has not received a certificate of qualification from the state board of medical registration and examination (Gen. St. 1901, †6675), and he appeals. Affirmed.

W. J. Costigan and Jno. T. Little, for appellant. F. S. Jackson, Atty. Gen., John S. Dawson, Asst. Atty. Gen., and Walter Pleasant, for the State.

MASON, J. Joseph Huff appeals from a conviction upon a charge of violating the statute which forbids any one to practice medicine who has not received a certificate of qualification from the state board of medical registration and examination. The determination of the case involves the consideration of portion of sections 6675 and 6674 of the General Statutes of 1901, reading as follows:

"From and after the 1st day of September, 1901, any person who shall practice medicine and surgery or osteopathy in the state of Kansas without having received and had recorded a certificate under the provisions of this act, or any person violating any of the provisions of

this act, shall be deemed guilty of a misdemeanor."

"Any person shall be regarded as practicing medicine and surgery within the meaning of this act who shall prescribe, or who shall recommend for a fee, for like use, any drug or medicine, or perform any surgical operation of whatever nature for the cure or relief of any wounds, fracture, or bodily injury, infirmity or disease of another person, or who shall use the words or letters 'Dr.,' 'doctor,' 'M. D.,' or any other title in connection with his name which in any way represents him as engaged in the practice of medicine and surgery; but nothing in this act shall be construed as interfering with any religious beliefs in the treatment of disease, provided that quarantine regulations relating to contagious diseases are not infringed upon. All persons who practice osteopathy shall be registered and licensed as doctors of osteopathy, as hereinbefore provided, but they shall not administer drugs or medicines of any kind nor perform operations in surgery. This act shall not apply to any commissioned medical officer of the United States army, navy, or marine service, in the discharge of his official duties; nor to any legally qualified dentist, when engaged in the legitimate practice of his profession; nor to any physician or surgeon who is called from another state or territory in consultation with a licensed physician of state, or to treat a particular case in conjunction with a licensed practitioner of the state, and who does not otherwise practice in the state. Nor shall anything in this act apply to the administration of domestic medicines, nor to prohibit gratuitious services."

The information contained three counts. The first, after alleging that the defendant had not received a certificate authorizing him to practice medicine, and that he was not within any of the exceptions of the statute, charged that he "did * * * unlawfully prescribe and recommend for a fee drugs and medicines for the cure and relief of bodily infirmity and disease of another person, * * * to wit, Florence McNutt." The second and third were substantially the same, except that other names were substituted for that of Mrs. McNutt. A verdict of guilty was returned upon the first and second counts, and sentence was pronounced upon the second only.

The defendant presented a plea in bar, which showed these facts: Prior to his arrest in the present case, he had been prosecuted before a justice of the peace upon a complaint containing two counts; each charging in general terms a violation of the medical practice act. Neither gave the name of the person he was said to have attended. The only difference between them lay in the dates and in the phraseology employed. The first charged that the defendant "on or about the 15th day of April, 1906, * * * did * * * * unlawfully and willfully prescribe and recommend for a fee, drugs and medicines for the cure and relief of infirmity and disease of another person." The second that he "on or about the 15th day of May, 1906, and for more than a year next prior thereto * * * was unlawfully and willfully engaged in the practtie of medicine by then and there prescribing and recommending for a fee, drugs and medicines for the cure and relief of infirmity and disease of other persons." Otherwise they were substantially alike. At the conclusion of the evidence the county attorney announced that the state "did not ask for a conviction on the first count, but would rely for a conviction on the second count." The case was then argued and submitted. The ensuing proceedings are thus shown by the docket:

"The jury, after being out for a reasonable time (about 10 hours), came into court and reported that it was impossible for them to agree. The court, after being satisfied that the jury could not agree, discharged them." Afterwards an order of dismissal without prejudice was made. The plea in bar alleged that the complaint was for the same offense as that charged in the information. The state demurred to the plea, and the court sustained the demurrer. The defendant now complains of this ruling and makes two contentions: (1) That the discharge of the jury was equivalent to an acquittal and is a bar to the present prosecution, inasmuch as the record does not show a sufficient investigation and determination by the justice of the question whether such discharge was necessary; (2) that the abandonment of the first count after a jury was impaneled had a like effect and is attended with the same consequence.

Neither contention is well founded. In State v. Klauer, 70 Kan. 384, 78 Pac. 802, the discharge of a jury was held to be a final disposition of a criminal case, because "no judicial investigation or determination was made at the time, and no finding of the necessity for a discharge entered the record." There, however, it was affirmatively shown that "the court made no investigation or inquiry at the time the jury was brought into court and discharged as to whether they could probably agree or not, and the court made no judicial investigation or determination of the question at that time, and made no finding thereon at the time the jury was discharged." Here the docket recites that before discharging the jury the justice was satisfied that they could not agree. This is a sufficient record of what amounts to a finding that it was necessary to discharge the jury, and implies that a judicial examination was made of that question. It is not necessary that the record should show the full extent of the inquiry, the evidence received, or the grounds of the decision. Nor is the correctness of the conclusion reached open to collateral attack. There was therefore no error in sustaining the demurrer to the plea in bar so far as this feature of it is concerned. Apparently, the two counts of the complaint were intended as two methods of charging the same offense. It has been held that in such a case, where a conviction is had upon one count, even a verdict of not guilty on the other will not prevent a subsequent hearing on both counts, if a new trial is granted at the request of the defendant. Lesslie v. State, 18 Ohio St. 390; Jarvis v. State, 19 Ohio St. 585. However that may be, the abandonment of one count under such circumstances, being merely a final election not to rely upon the particular manner therein employed to charge the offense, does not prevent a further prosecution upon the other count in that proceeding, and consequently cannot be a bar to a new action, if the first one, after a mistrial, is properly dismissed without prejudice. If, therefore, the two counts of the complaint related to the offense, the fact that the first one was abandoned presented no obstacle to the subsequent proceeding by information. If, on the other hand, the two counts did not refer to the same offense, the defendant can now derive no advantage from the fact. The plea in bar did allege that the information was "founded on the same facts and circumstances as was said first count in said complaint;" but it also alleged, in substance, if not in express terms, that the sceond count of the complaint—the one which was submitted to the jury and upon which they failed to agree—likewise charged the

same offense as the information. No attempt was made to distinguish between the several counts of the information. The plea in bar was not directed against any particular count, but against the entire prosecution. Its allegations were perfectly consistent with the hypothesis that the two counts of the complaint referred to the same offense—that while the information charged the same offense as the first count, it also charged the same offense as the second count. To have been good on its face, the plea should have shown affirmatively, not only that the information charged the same offense as the first count of the complaint, but also that the two counts were for different offenses, in order that it should have been made to appear that the new action was not a renewal of that in which the jury disagreed. For these reasons the demurrer to the plea in bar was rightly sustained.

There is little room for controversy as to the facts in the case. The defendant took the stand in his own behalf, and testified that he was a farmer; that he was not a doctor; that he manufactured from vegetables grown on his own farm what he believed to be a remedy for cancer; that he had used it upon from 50 to 75 different patients, one of whom was Mrs. Stewart, the person named in the second count; that he applied it himself, describing the process thus: "I take a little stick and get a little medicine on it, and put it on the cancer, the diseased part, and that works from 15 minutes to half an hour, until it works the strength out of the medicine, and I then clean that off and apply it again." The state's evidence showed, or tended to show, that the defendant had treated Mrs. Stewart under a contract, by the terms of which he was to receive $50 down and a like amount when a cure should be effected; that the first $50 had been paid to him. It is claimed on behalf of the defendant that the evidence, the scope of which is fairly indicated by the foregoing statement, did not warrant a conviction under the pleading, inasmuch as the application of the purported remedy was a surgical operation, while the information charged only the practice of medicine, and nowhere even mentioned surgery. To discuss the technical distinctions relied upon to sustain this contention would be a useless waste of effort. We are concerned only with the interpreattion of the Kansas act, which provides that for its purposes any one shall be regarded as practicing medicine and surgery "who shall prescribe, or who shall recommend for a fee, for like use, any drug or medicine, * * * for the cure or relief of any * * * infirmity or disease of another person." The language quoted is followed in the information, and, if the defendant's acts are within its terms, it is immaterial whether they also amounted to the practice of surgery. But it is further argued that "the prescribing and recommending denounced by the act refers to drugs and medicines to be used by the patient himself," and that as the defendant in this case applied the remedy he was not within the terms of this part of the statute. Possibly the word "prescribe" may sometimes have the meaning thus attributed to it, although it is not clear why the same person may not prescribe and administer a remedy. But a broader intention in evidenced by the accompanying phrase "or recommended for a fee for like use," which appears to have been employed to guard against any narrow or technical construction. The jury were abundantly justified in finding that the defendant did not contract for the payment to him of the $100 either as the purchase price of the material he

furnished, or as compensation for his service in applying it, but that the charge was essentially one for imparting his peculiar knowledge of its curative powers, and that the transaction therefore amounted to recommending a medicine for a fee within the letter and spirit of the law.

Several assignments of error involve the consideration of the meaning of the provision of the medical act that nothing therein shall apply to "the administration of domestic medicines." The trial court instructed the jury that: "The term 'domestic medicines,' as used in this law, means medicine as practiced by unprofessional persons in their own families or households." This instruction was manifestly based upon the definition of the phrase "domestic medicine" found in several standard dictionaries. The Century and Imperial define it as "medicine as practiced by unprofessional persons in their own families;" the Encyclopædic as "the practice or use of medicine by unprofessional persons in their own households." Objection is taken to the application made of these definitions upon the somewhat plausible ground that "medicine" is there used abstractly, referring to the science or practice of medicine, while in the statute "medicine" is obviously used concretely, referring to substances, as a synonym for "remedies." The force of this objection is lessened by having regard to the entire phrase employed in the statute—"the administration of domestic medicines." Although it can hardly be strictly accurate to say that the bare words "domestic medicines" means "medicine as practiced by unprofessional persons in their own families," the expression "the administration of domestic remedies," taken by itself, might well be thought to mean just that. Of course, if the instruction conveyed a correct idea as to the force of the statute, it is not material that it was open to verbal criticism. The Kansas medical act does not follow closely that of any other state, but it bears internal evidence of having been modeled in part upon the Ohio statute of 1900 (94 Ohio Laws, p. 197), where the corresponding language is that the act shall not be construed to prohibit "the domestic administration of family remedies." Precisely the same expression is found in the laws of California, Massachusetts, and New Mexico. Those of Indiana and Utah read, "the administration of family remedies;" of Nebraska, "the administration of ordinary household remedies." In Illinois, in a recent revision, "the domestic administration of family remedies" was changed to "the administration of domestic or family remedies." These slightly different but substantially similar phrases seem intended to express the same essential thought. That they were in such general use when our statute was enacted suggests a purpose to cover about the same ground by the words "the administration of domestic medicines;" that is, the domestic administration of medicine—the administration of medicine in one's own family.

To have recourse again to the lexicographers, it may be noted that Appleton's Medical Dictionary and Gould's Illustrated Dictionary of Medicine define "domestic medicine" as "the use of domestic remedies;" but, as neither attempts to give the meaning of "domestic remedy," the definition is not illuminating. If, however, "domestic medicine" is the use of medicine in one's own family, and is also the use of domestic remedies, it would seem logical to follow that domestic remedies or domestic medicines are those which one uses in his own household. Foster's Encyclopædic Med-

only certain enumerated drugs. Rev. St. N. Y. 1901, p. 2862, † 199.

It will be observed that the meaning pointed to in these expressions is in a way a modification of that adopted by the trial court. The phrase "domestic medicines," referring to those remedies which are in fact used by a nonprofessional person in his own home, appears to have been diverted from its original and literal import, perhaps in part by the addition of the qualification "usual," so as to signify such substances as are commonly kept by nonprofessional persons in their own homes for use as remedies in the absence of a physician, being necessarily substances the effect of which is a matter of general knowledge, so that no special training is required for their safe administration. If this signification be accepted as that intended in the medical law, it is obvious that cases may arise in which it is proper to submit to a jury the question whether a particular remedy, which a defendant may be charged with administering under such circumstances as to make the act unlawful, was a domestic medicine; but no such situation is presented here. There is nothing in the evidence in this case to suggest that the substance applied by the defendant was one in common use or one the effect of which was generally understood; but, apart from this, other considerations compel the conclusion stated. The statute in general terms forbids one not having a certificate to practice medicine. It adds that any person shall be regarded as practicing medicine who shall prescribe or recommend for a fee for like use any drug or medicine; that registered osteopaths may practice their profession, but "shall not administer drugs or medicines of any kind;" and that nothing in the act shall "apply to the administration of domestic medicine" or "prohibit gratuitous services." It would defeat the manifest purpose of the law to hold that under these provisions a defendant, charged and proved to have received money for recommending a certain substance as a cure for disease, might exculpate himself by showing that the substance he recommended was a domestic medicine, in the sense that it was a well-known remedy, the effect of which was a matter of common knowledge. A nonprofessional person is permitted under the law to administer domestic medicines, but not to take pay for recommending their use. The theory of the state is that one who proposes to ask and receive compensation for advice as to the use of medicines thereby holds himself out as possessed of special and peculiar information on the subject, and that it is the province of the state to see that he posses it, or in default of proof thereof to prevent his making the unfounded claim a source of revenue. To the charge that an incompetent person has unlawfully taken pay for recommending the use of a particular remedy it is no answer to say that the remedy is one the effect of which is a matter of common knowledge, and which for that reason may be administered by any one without a violation of the law. Under the defendant's own statement he was guilty of the offense charged against him, if for a fee he recommended the use of his medicine as a remedy for cancer, whether it was a "domestic medicine" or not. The jury by their verdict found that he did so, and the evidence abundantly justified the verdict. The instruction referred to therefore could not have prejudiced him, and constituted no error of which he can complain.

A final claim of error is based upon the refusal of the court to give a peremptory instruction to the jury at the con-

clusion of the state's evidence to return a verdict of not guilty, upon the ground that it had not been shown that the defendant did not come within any of the exceptions of the statute—for instance, that he was not a medical officer of the army or navy. This court has already in effect decided, in accordance with the general rule, that it is incumbent upon the defendant to produce evidence upon such matters, as they lie peculiarly within his knowledge. State v. Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679. Moreover, the defendant in this case testified that he was a farmer, living in the county where he was tried, and it clearly appeared that he was neither an officer, a foreign physician, nor a dentist engaged in the practice of his profession. The complaint on this score is without substance.

The judgment is affirmed. All the Justices concurring.

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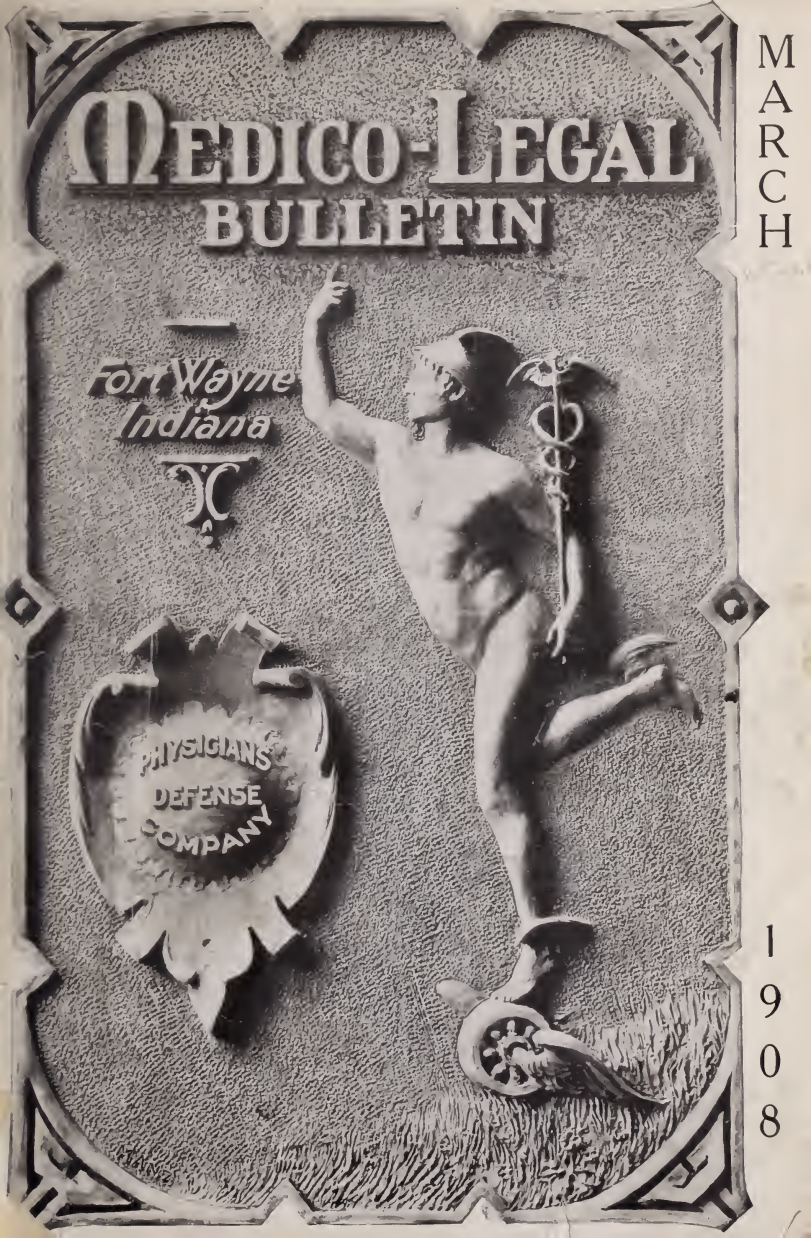
MEDICO-LEGAL BULLETIN

Fort Wayne Indiana



MARCH

1908

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 5 **MARCH 1908** NO. 1

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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FORT WAYNE, INDIANA

NUMBER

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The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ *of the City of* _____, *County of* _____, *State of* _____ *against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding* FIVE THOUSAND DOLLARS *in defense of any one suit, nor exceeding in the aggregate* TEN THOUSAND DOLLARS *in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the condition-herein below stated, to-wit:—*

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Indiana, of any suit brought, or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, or copies thereof, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof, that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the above mentioned sums shall have been expended in said defense, providing, that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof.

Each consecutive full years' renewal of this contract shall add five per cent. (5%) of the principal sum to the amount for the defense of any one suit, and to the amount for the defense of any number of suits within one year, conformably with the table of accumulations endorsed hereon, but, such addition shall never exceed fifty per cent. (50%) of the aforesaid principal sums

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration in advance at the Home Office in Fort Wayne, Indiana, or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__

(SEAL)

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President

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Secretary

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City of.....County of.....State of.....

If connected with a firm, the style is.....

I graduated from the..... in the year.....

I practice under the..... School of Medicine, and have been duly Registered and Licensed

to practice in this County, and under the laws of this State, and am a member in good standing in the .....

.....

I do not own or maintain a hospital or sanitarium, except as follows:

Name..... No. of beds.....

I agree that this Contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph when demand is made or suit commenced for damages, and to immediately forward by mail any summons served, copy of the complaint filed, a history of the case and of the services rendered as per instructions from the Home Office, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance, not pecuniary, in defense of the case, without charge to the Company.

Date.....190.... Applicant's Signature.....

MEDICO-LEGAL BULLETIN

VOL. 5 MARCH, 1908 NO. 1

EFFECT OF CONTRIBUTORY NEGLIGENCE UPON THE PART OF THE PATIENT IN ACTIONS FOR MALPRACTICE AGAINST THE PHYSICIAN

The counterpart of the physician's duty in attendance upon his patient to exercise due care and skill, is found in the patient's duty to obey and conform to all the instructions and prescriptions of the physician, if they are such as physicians or surgeons of ordinary skill and care would sanction or adopt. Another duty which rests upon the patient, even in the absence of express instructions, is that he use ordinary care under all the circumstances in protecting himself from further injury. If he failed to conform to instructions, or to use ordinary caution, the law considers that he has been guilty of contributory negligence and denies him the right to recover anything whatever, even though it has been shown that the defendant was also guilty of negligence. The reason upon which this rule of law as to contributory negligence is based is the axiomatic principle that no one can obtain from another party compensation for his own misconduct, and where a certain injury is due in part to the defendant's carelessness and in part to the plaintiff's the "law has no scales to determine whose wrong-doing weighed most in the compounding that occasioned the mischief." In one of the earlier malpractice cases involving the question of contributory negligence (Geiselman vs. Scott, 25 O. St. Rep. 87), the court upheld the following instruction given upon the trial of the case: "If you shall find that the defendant directed the plaintiff to observe absolute rest, as a part of the treatment to said foot, and that the directions were such as a surgeon or physician of ordinary skill would adopt or sanction, and the plaintiff negligently failed to observe such direction, or purposely disobeyed the same, and that such neglect or disobedience proximately contributed to the injuries of which he complains, he cannot recover in this action, although he may prove that the defendant's negligence and want of skill also contributed to the injury. This grows out of the doctrine that a party, who has directly, by his own negligence or disregard of duty, contributed to bring an injury upon himself, cannot hold other parties who have also contributed to the same, responsible for any part thereof, nor does it make any difference that one of the parties contributed in a much greater degree than the other; the injured party must not have contributed at all."

It is to be noted, however, that the instructions of the physician, in order to be binding upon the patient must be such as an ordinarily skillful physician would give or approve of. In the case of McCandless vs. McWha, 22 Pa. St. 261, the patient was suffering from a comminuted fracture of both tibia and fibula. The defendant attempted to effect extension and counter-extension by binding splints on the fore and back part of the leg reaching from the ankle to the knee. These splints were bound on in such a way as to impede circulation, and to irritate the parts and cause them to be considerably swollen, thereby causing much pain. The patient, unable to stand the pain, loosened the bandages. This act, the defendant claimed, contributed to the

injury, and should therefore be a defense to the action, but the court thought not. Justice Lewis said: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction. But if it be painful, injurious, and unskillful, he is not bound to imperil his health, and perhaps his life, by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper, and adapted to the end in view.

And it is further to be noted that if the neglect of the patient to obey the physician's instructions should be induced by false information given by the physician to the patient concerning the nature of his malady, such failure could not constitute contributory negligence, It is so held in the case of Geisleman vs. Scott cited above.

At first glance the decisions dealing with this question appear to conflict considerably with one another, but in many instances the conflict is only apparent. Where there have been acts of negligence on the part of both plaintiff and defendant, and it is easily possible to separate the injurious results flowing from the plaintiff's acts from the injuries resulting from the defendant's acts, such negligence on the part of the plaintiff will not be considered contributory negligence that will bar all right of recovery. The plaintiff will be allowed to recover for his injuries so far as they result from the defendant's acts, and his own negligence will not completely bar his right of action, but will merely be considered in mitigation of the damages recoverable from the defendant. Thus in the case of DuBois vs. Decker, 29 N. E. 313, the defendant asked the court to charge that: "if the plaintiff did not obey the defendant's instructions, and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant. "It appears from the testimony of the defendant that after the second amputation he dressed the stump and put the plaintiff in position by elevating the limb so as to prevent hemorrhage, and to change pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed, and got his leg to bleeding; and that he presumed this bleeding interfered with the healing of the limb. It also appears that some time after the second amputation the plaintiff refused and neglected to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room so as to avoid liability of contracting erysipelas from a patient that had been brought to the almshouse afflicted with that disease, he left and went away. While the removal of the limb from the position in which it was placed may have produced the bleeding, and thus to some extent have impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages, and would not relieve the defendant from the consequences of previous neglect or unskillful treatment. As to the prescription, we are not told what it was, nor what it was for, and the jury was therefore unable to determine whether or not the condition of the patient would have been materially changed by its use."

"The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this

contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad, if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of. In the case of Carpenter vs. Blake 75 N. Y. 12, the court was requested to charge that, if the plaintiff was guilty of negligence in the management of the arm, through or without the fault of the attending surgeon, after the defendant ceased to have charge of the case, and such negligence contributed in any material degree to produce the present bad condition of the arm, the defendant was not responsible. This request was refused, and it was held properly, for the reason that the request was too broad; that, if there had been subsequent negligence, the cause of action for defendant's negligence would simply come in mitigation of damages. In the case of McCandless vs. McWha, 22 Pa. St. 261-272, Lewis, J., in delivering the opinion of the court says: "It follows that before the surgeon can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper, and adapted to the nature in view. It is the duty of the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his professional brethern. It will not do to cover his own want of skill by raising a mist out of the obstinate disposition of the patient."

In another decision, that of Hibbard vs. Thompson, 109 Mass. 286, the rule was laid down that where, in the course of treatment, the patient is guilty of contributory negligence, resulting in an aggravation of his injury, yet if the physician continues to treat him and subsequent to the time of the patient's negligence is himself guilty of negligence, liability on his part will not be prevented by the fact of the patient's prior negligence. The Supreme Court of Massachusets in the above case upheld the following instruction which had been given by the trial court: "The burden of proof is on the plaintiff to show that all the injury for which he seeks damages proceeded solely from the want of ordinary skill and care on the part of the defendant. If it be impossible to separate the injury occassioned by the neglect of the plaintiff himself, from that occasioned by the neglect of the defendant, the plaintiff cannot recover; if, however, that can be separated, if such injury as the plaintiff may show, proceeded solely from the want of ordinary skill or care of the defendant, he may recover. In the present case, the plaintiff claims damages of the defendant for want of ordinary care and skill in the treatment of him by the defendant, by which, as he says, first a bed sore was caused, and second, after the bed sore was caused, it was improperly treated, and neglected. If the plaintiff should fail to satisfy you that the sore was caused by neglect of the defendant, for this damage he could not of course recover, but he might still recover for the injury given to him solely by the subsequent neglect of the defendant in not taking proper care of it (should he prove such neglect) even if the sore was occasioned by the plaintiff's own carelessness. If, however, in the case last supposed, injury has resulted to the plaintiff not solely from neglect in the subsequent treatment of it by the defendant, but also from his own subsequent neglect, and the jury are not satisfied but that both causes have combined to produce the subsequent injury, the plaintiff cannot recover for it. While on the one hand the defendant would not be released from his duty to

exercise ordinary care and ordinary skill in his subsequent treatment of disease, because at the previous stage of it the plaintiff had been negligent and had thus contributed to the condition in which he was, on the other hand it would be for the plaintiff to show, if he seeks damage for want of ordinary skill on the part of the defendant in subsequent treatment, that it proceeded solely from this, and not from any subsequent neglect on his own part."

Ordinarily, where the contributory negligence of the patient is simultaneous with the physician's negligence, the ill effects flowing from the separate acts of negligence cannot be apportioned and accordingly the proof of contributory negligence will constitute a complete defense. But where the contributory negligence is subsequent in time to the physician's negligence, it oftentimes happens that there can be a fair apportionment of the damage flowing from the acts of negligence of the different parties. However, in many instances it has been held that even here the law cannot determine with sufficient accuracy the amount of damage which is due to the physician's as distinguished from the patient's actions. This is well illustrated in the case of Young vs. Mason, 8 Ind. App. 264.

In this case the patient had fractured her left forearm at the wrist and dislocated both bones of the elbow and fractured the inner condyle of the humerus. The jury found that the defendant had not used due care and skill in reducing the fracture near the wrist. In answer to interrogatories, they stated that the plaintiff had not followed the physician's directions in regard to keeping the arm in the sling and in other matters of caring for the arm. The interrogatories and answers and the court's opinion bearing on this branch of the case are as follows:

"Did not the defendant, at his first visit, after having properly examined, reduced, adjusted, bandaged, and dressed the arm, and at divers other times, order and direct plaintiff not to remove her arm from the sling, but to keep it in the sling at rest? A. Yes.

"If you answer question 18 (the preceding question) in the affirmative, state if such orders and directions given the plaintiff by the defendant were proper, and whether a strict observance of the same was necessary to the proper treatment of the injuries of the arm. A. In the main it was.

"If you answer question 18 in the affirmative, state if it is not true that the plaintiff failed, refused and neglected to obey the orders and directions of the defendant by taking and removing the arm from the sling in the defendant's absence. A. She did in part.

"Is it not true that the plaintiff at divers times within the first, second, and third weeks following her injuries, removed the injured arm from the sling in violation and disregard of defendant's directions and instructions? A. Yes.

"Did the plaintiff obey the directions and instructions of the defendant in the matter of caring for and treating her arm in his absence? A. Not entirely.

"If you answer question 28 (last question) in the negative, state fully how and in what manner the plaintiff failed to follow defendant's directions and instructions. A. By taking her injured arm out of the sling and placing it on her lap, window-sill and table.

"Is it not a fact that the injured arm was highly inflamed and very much swollen for a time? A. Yes.

"If you answer question 31 in the affirmative, state if the inflammation and swelling was not produced in part as the

natural result of the injuries sustained? A. Yes.

"If you find that the plaintiff, at divers times within the week following the injury removed her arm from the sling, state if it is not true that the natural tendency of such conduct was not to aggravate and increase inflammation and swelling. A. It was to some extent.

"If you answer question 33 in the affirmative, state if it is not true that the inflammation and swelling of the plaintiff's arm was not aggravated and increased by the removal of her arm from the sling. A. It would partially.

"Is it not a fact that the natural effect and tendency of such inflammation and swelling over and about the injured parts, and over and about the ligaments, tendons, muscles, and soft parts of the arm was to produce and cause a stiffened condition of the elbow, wrist, and finger joints? A. Yes.

"If you find that the arm at and about the points of the injuries was greatly inflamed and swollen, and that the natural tendency of such inflamed and swollen condition was to cause stiffness at the elbow, wrist, and finger-joints, what do you find from the evidence was the proper treatment of the arm in that condition to prevent or overcome such tendency to stiffness in said joints? A. Passive motion and the application of lotions.

"Do you not find that the arm was highly inflamed and swollen for a time, and that the natural tendency of such condition was to produce stiffness in the joints if not properly treated, and that the proper treatment to prevent such results was to use passive motion. A. Yes.

"Is it not a fact that the defendant, at the proper times, used such passive motion at these joints, when allowed to do so by the plaintiff, as fully and freely as she would permit? A. Yes.

"Is it not a fact that the plaintiff, on account of the pain (caused) by the defendant's effort to produce passive motion at the elbow, wrist, and finger-joints, refused to allow him to employ such means for her recovery, and that he was prevented, by such refusal from using such passive motion at the times and to the extent proper? A. Yes.

"If you find from the evidence that there is a partial stiffness at the elbow, wrist, and finger-joints, do you not find that this condition of these joints resulted, in whole or in part, from the refusal of the plaintiff to permit the defendant to subject these joints, at the proper times, to passive motions? A. In part.

Before considering the effect of these answers, we will briefly refer to the authorities which relate to the duties of the patient in such cases, and also the question of contributory negligence on his part.

In Potter v. Warner, 91 Pa. St. 362, 36 Am. Rep. 668, the court says: "It is, however, the duty of the patient to submit to the treatment prescribed, and to follow the directions given, provided they be such as a physician of ordinary skill would adopt or sanction. * * * If the injuries were the result of mutual and concurring negligence of the parties, no action to recover damages therefor will lie. A person cannot recover from another for consequences attributable in part to his own wrong. Nor is it necessary that the negligence of each party be equal, to defeat a recovery. Cattawissa R. R. Co. v. Armstrong, 13 Wright, 186."

Indulging every reasonable presumption and intendment in favor of the general verdict, and granting that the appellant established, to the satisfaction of the jury, every fact put in issue by the allegations in her complaint, except when

the answers to the interrogatories affirmatively and conclusively show to the contrary, and giving a fair and reasonable construction to the facts, which are clearly, specifically, and without conflict or contradiction, found in said answers, we conclude that the negligence of the appellee in failing to reduce the fracture near the wrist, and the refusal of appellant to allow appellee to subject the injured joints at the proper times to passive motion concurred in producing the injuries for which recovery is sought.

It is urged by counsel for appellant that one of the injuries complained of is the failure to reduce the fracture, and that it is not shown that any negligence of appellant contributed to this injury.

We do not so understand the allegation in the complaint. The failure to reduce the fracture near the wrist is one of the alleged negligent acts of appellee. This act, with other acts of negligence, it is charged, as we have seen, caused the injuries specifically complained of, as hereinbefore stated, for which damages are sought. The bone was fractured near the wrist, and the elbow was dislocated. Appellee, in all respects, fully discharged his duty, except he failed to reduce the fracture. The appellant did not obey his directions, and refused to allow appellee to subject the injured parts at the proper times to passive treatment, and this contributory negligence on the part of the appellant united with the said negligence on the part of appellee in causing the adhesion of the bones to the surrounding parts, the stiffness of the joints and the loss of the use of the arm. In other words, it is not charged that the failure to reduce the fracture is one of the injuries which resulted from his negligence, but this act is charged as the negligence which caused the stiffness of the joints. If the failure of appellee to reduce the fracture had caused the stiffness of the joints, without any negligence of appellant contributing thereto, appellee would undoubtedly be liable in damages therefor. The injuries complained of were certainly aggravated by the misconduct of appellant and therefore appellee, under the authorities, is not liable in damages therefor. Jones vs. Angell, Supra.

The condition of the arm, the loss of its use, the stiffness of the joints, are the injuries of which it is alleged the negligent acts of the appellee were the proximate cause, and these injuries are shown by the answers to the interrogatories to have been the result, in some degree at least, of contributory negligence on the part of appellant. Jones v. Angell, Supra.

For instance, suppose a man fractures the bones in his leg below the knee, and calls a surgeon to treat his injuries, and the surgeon negligently fails to properly reduce one of the fractures, but in all other respects gives proper treatment, and the patient, in disobedience of the directions of the surgeon, negligently removes the bandages used as a part of the proper treatment by the surgeon, or is otherwise guilty of contributory negligence, and such combined negligence of the surgeon and patient unite in producing a shortness and stiffness of the leg, for which injuries an action is brought against the surgeon, can the patient recover? The patient is certainly not responsible in such case for the original negligence of the surgeon in failing to properly reduce the fracture, but this negligence of the surgeon unites with the subsequent contributory negligence of the patient in causing the shortness and stiffness of the leg. Now, it seems clear to us under such circumstances, and the authorities cited, that the patient cannot recover for the consequent shortness and stiffness of the leg. When both the sur-

geon and patient are free from negligence, or where the surgeon and patient are both guilty of negligence, or where the surgeon is free from fault and the patient is guilty of negligence, no recovery can be had by the patient against the surgeon in any case. It is only where the surgeon is guilty of negligence and the patient is without negligence on his part, contributing in any degree to such injuries, that the patient can recover damages of the surgeon.

In this case it appears, as we have seen, that both parties were, in some degree, at least, in fault in producing the injuries in question, and therefore the court below did not err in rendering judgment for appellee."

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession.

LIABILITY OF PRIVATE HOSPITAL FOR NEGLIGENCE OF ITS NURSES AND EMPLOYES

HOGAN V. CLARKSBURG HOSPITAL CO., 59 S. E. 943 (W. VA.)

M'WHORTER, J. Edward Hogan brought his action of trespass on the case in the circuit court of Harrison county against the Clarksburg Hospital Company, a corporation. The defendant demurred to plaintiff's declaration, which demurrer was overruled. The defendant then pleaded not guilty, and a jury was impaneled to try the case. When the evidence of the plaintiff was all in, the defendant moved the court to strike out the plaintiff's evidence, which motion the court sustained, and the jury returned a verdict for the defendant. Plaintiff moved the court to set aside the verdict of the jury, and grant him a new trial, which motion was overruled, and to which several rulings of the court the plaintiff excepted, and says that the court erred in sustaining the motion to strike out the evidence, and also in overruling the plaintiff's motion to set aside the verdict and grant a new trial.

Three witnesses were examined in the case—the plaintiff, Dr. Showalter, and Miss McGann, one of the nurses in the hospital at the time the plaintiff was an inmate. Plaintiff's own testimony shows that he was subject to epileptic fits prior to the time of his being taken to the hospital of the defendant in February, 1905; that he was suffering from one of his fits at the time he was taken to the hospital, and knew nothing of being taken there, and did not know who was treating him, but says his bartender was waiting on him before he went to the hospital, and when asked what physician, if any, he had, stated that "Dr. Johnson was said to be the man," but said that he did not know anything about who was treating him at that time. Miss McGann testified: That she saw two men bringing Hogan into the hospital from the ambulance. That she did not know his condition. She says: "I saw them bring him in, two men helped him in, and then I did not see him again until after he was burned." That he was placed in the front room on the second story on the right hall. That he was brought there, she thinks, about 9:30 o'clock in the morning. That the room in which he was placed was one of the best in the house, had two beds in it, and was heated by a gas fire, an open fire without a grate, with an asbestos back. She says she went upstairs when the tray bell rang for dinner, an odor quite intense met her, and she went to plaintiff's room, and found him in the middle of the floor. "His nightgown was mostly burned all off. Some pieces were burned in strips. He didn't know himself. He was quiet,

making no racket at all." That both beds were ruffled up when she found them, and both were on fire—were not blazing. The mattress on one was burning considerably. Nobody was in the room except plaintiff. That Miss Leon was his nurse, but had gone off duty before he was burned. "We always got off two hours when we had time from 10 to 12, something like that." When asked to describe plaintiff's burns, witness said: "His hand was burned very bad, his side and his arm. Scars are there, I think, show better than I can tell you." And, when asked how long he had been in the building when he was burned, answered: "It couldn't have been more than an hour, or an hour and a half since he was brought in. He was brought in that morning, and when the tray bell rang was the time I found him." Then was asked: "How long after Mr. Hogan was burned before he regained consciousness, and knew about his injury? A. I don't know. I know he was there several weeks before he knew he was burned. For the first time or two he did not say anything about his burns, but after that he let us know he was burned when we dressed them. It was several weeks before he knew he was burned at the City Hospital." From the plaintiff's own testimony he seems to have been entirely oblivious as to when or how he got to the hospital or when he was burned. He states that, when he recovered consciousness, he had an interview with the superintendent, Dr. Payne, who wanted to know who was going to pay his bills, when he told him he would pay them himself; that there was nobody else to pay them. He told the doctor he had a check book in his clothes; that they took his clothes out of the room and he asked the doctor to get his check book; that he went away, and he did not see him any more for three or four days, when the doctor came back and apologized, and told him that he had learned that he was all right; that he wanted to settle with him at the end of each week and get out of the hospital, but the doctor would not let him go. Plaintiff exhibited two checks one for $75, payable to the Clarksburg City Hospital, the other for $60, dated April 11 and 19, respectively, 1905, the amount he had paid the hospital, and stated that he also paid Dr. Johnson $47 for treatment. The plaintiff also introduced Dr. U. W. Showalter, and proved that he was a stockholder in the defendant company, and that it operated that hospital when plaintiff was there.

Plaintiff in error, by counsel, says the case presented here involves two questions: "(1) What degree of care should be required of a hospital company maintaining a hospital for receiving and treating diseased persons for hire or profit toward persons committed to its care, while on its premises and under its control, the failure to exercise which constitutes actionable negligence? (2) Whether the evidence presented in this case makes a prima facie case of negligence such as should have been submitted to the jury." Counsel for defendant in error agree that these are the propositions involved, and say that their views on the first proposition differ very little from those advanced by plaintiff's counsel, and claim that the rule applied to public or charitable institutions does not apply to this case, citing from Thompson on Negligence ‡‡ 6711, 6713, to support their contention that a hospital is nothing more than an aggregation of physicians and surgeons and their assistants, and that the hospital should conform to the rules laid down for physicians and surgeons in said sections; and also cite Lawson v. Conaway, 37 W. Va, 159, 16 S. E. Rep. 564, 18

L. R. A. 627, 38 Am. St. Rep. 17, and quote from the syllabus point 3, in said case, the following: "The physician is bound to bestow such reasonable ordinary care, skill, and diligence as physicians in the same neighborhood in the same general line of practice ordinarily have and exercise in like cases"—which case was an action against a physician for malpractice in the treatment of a broken arm. All the authorities cited are inapplicable to the case at bar. The question here does not arise as to the skill, care, and attention of any physician. The plaintiff had just been put into the hospital, and it does not appear from the evidence that he had yet received the attention of any physician. He had simply been received by the nurses and placed in a room. That which is complained of in this case is not the wrong or unskillful application of remedies, but the neglect to give that reasonable and ordinary care and attention which was needed and due to plaintiff after being received into the hospital at the hands of the employes of the defendant. The incorporators and stockholders of the defendant procured their charter for the purpose of carrying on a business in their corporate capacity, not for charitable purposes, but for private gain, and held themselves out to the public as an institution wherein the sick and diseased would receive medical treatment and proper care; the objects and purposes stated in their charter being: "To conduct a general hospital for the treatment of all diseases, both medical and surgical; to conduct a training school for nurses and to grant diplomas or certificates of graduation to persons completing the prescribed course of instructions; to buy, sell, lease, or rent all real estate and personal property necessary to conduct and operate a general hospital and training school for nurses or either or both; and to transact all other business and to do all things necessary to properly conduct the business herein mentioned." As defined in 21 Cyc. 1106: "A hospital created and endowed by the government for general charity is a public corporation; and a public hospital may be defined in general as an institution owned by the public and devoted chiefly to public uses and purposes." And at page 1110, same book: "A private hospital is one founded and maintained by a private person or corporation; the state or municipality having no voice in the management or control of its property or the formation of rules for its government." And at page 1111, same book, it is said: "A private hospital which is in its nature a charitable institution is not liable in damages to patients for the negligence or misconduct of its officers or employes, but the rule is otherwise where the hospital is not a charitable institution." And authorities cited.

It cannot be claimed that the defendant hospital here is a charitable institution. It was chartered and organized by four physicians and one other stockholder for the profits that could be made out of it for their private gain. These physicians were in control of the hospital, and sent their patients to it to be treated and cared for in the usual and ordinary way that patients are treated and cared for in hospitals, and patients so sent to the hospital were entitled to such oversight, care, and attention as their mental and physical condition might require. The plaintiff, when received, was shown to be in an unconscious condition, but not entirely helpless physically. It is not stated that he was carried into the hospital, but that "he was helped in by two men," implying that he could move about by the help of others. In Railway Co. v. Wood, 95 Tex. 223, 66 S. W. 449, 56 L. R. A. 592, 93

Am. St. Rep. 834, it is held: "If a railway corporation maintaining a hospital for its employes suffers one of them, while delirious from smallpox, to escape from the detention camp, and thereby to communicate the disease to another, the latter may recover of the corporation for the damages thus inflicted on him, if it or any of its employees was guilty of negligence to which such escape was due." In that case it was held that the diligence required of the railway company maintaining a hospital or detention camp in which one of its employees was confined while suffering with smallpox depended upon the character of the disease, and the danger of communicating it to others; that it assumed the duties of using ordinary care to prevent him from exposing himself in deliriums, or being exposed otherwise, so as to communicate the disease to others. In Chapin v. Y. M. C. A., 165 Mass. 280, 42 N. E. 1130, it is held: "If, while much of the work of a corporation, which has no capital stock and applies all its revenues to the purposes of its organization, is of a charitable nature, its purposes are also social, and include the giving of lectures and of theatrical and other entertainments for the benefit of its members, the provision of a gymnasium and of athletic sports for promoting their health and the sale of food at a coffee or lunch counter, it has no right to exemption from liability for injuries occasioned by its own negligence to persons rightly on its premises." See, also, Davis, v. Central Congregational Society, 129 Mass. 367, 37 Am. Rep. 368; Donnelly v. Boston Catholic Cemetery Association, 146 Mass. 163, 15 N. E. 505; Newcomb v. Boston Protective Department, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778. There can be no question about the liability of a hospital which is being conducted for private gain, and not for charitable purposes, for damages to its patients through the negligence or misconduct of its officers and employes. It is bound to exercise that degree of care towards its patients placed therein measured by the capacity of such patients to look after and provide for their own safety. It is the duty of such hospital to employ only competent physicians and nurses, and to treat such patients with such skill and care as ordinarily obtains in the conduct of such institutions, and to protect its patients in such manner as their condition may render necessary, and such degree of care and diligence should be in proportion to the physical or mental ailments of the patient rendering him unable to look after his own safety. The motion to strike out the evidence, taking from the jury the consideration thereof and thereby directing a verdict for the defendant, is similar to a demurrer to the evidence which entitles the plaintiff to the benefit of all the facts proved by the evidence introduced and to all the facts and inferences which might be reasonably drawn or taken as true from any and all the facts actually proved by the evidence; and, if such facts and inferences together are sufficient to make a prima facie case of negligence, then the same should be submitted to the jury. The facts here proved were that four physicians were stockholders in the company, and were conducting the same for their private benefit. It may reasonably be inferred that Dr. Johnson, one of the physicians, sent the defendant to the hospital for treatment, as it is shown that he was his patient. It is proved that the plaintiff was suffering from epileptic fits, and that he was sent to the hospital while under the influence of epilepsy, and was unconscious, knowing nothing of what was transpiring. While it is contended by defendant in error that the plaintiff, when

placed in the hospital, was wholly unable, physically, to walk alone, yet the inference is conclusive that he had sufficient physical ability to get about in the room. He was left alone; there were two beds in the room in which he was placed, and in which there was an open gas fire, both beds were rumpled, or as stated by the witness McGann, were "ruffled," and both on fire, showing beyond question that after he had gotten to the fire, and ignited his clothes, he had been to the beds, and fired them from his own burning clothes, and they were both burning when Miss McGann, the witness, entered the room and found him "in the middle of the floor," his clothes burning as stated by her. It is to be reasonably inferred, further, that some time elapsed from the time he came in contact with the fire until she found him, as no blaze was seen either on the beds or plaintiff's clothes, so they must have been slowly burning for some time. It is suggested by counsel for defendant in error that, in the absence of proof, the court will not take judicial notice of the time required to partially burn a cotton nightshirt off a man's back, but that all the burning proved might easily have occurred within two minutes or less. This occurrence was in midwinter, and the inference may readily be drawn that plaintiff's nightshirt was not cotton, and that the material burning was not of a very inflammable nature.

It is claimed by defendant in error that plaintiff failed to prove his condition when brought to the hospital. It was shown that he was brought there in an unconscious condition, and yet, from the evidence, it must be inferred that, while possibly not able to walk alone, he was physically able to get up, but liable to fall in any direction. It is also claimed that he failed to prove that physicians and nurses treating patients in a hospital, in the exercise of ordinary skill and diligence, are constantly in the room with such patients, or that in the treatment of a person suffering with epilepsy it was customary for them to remain constantly in the room of such person; and that he failed to prove any facts showing that the defendant's employees might have foreseen the possibility of injury to the plaintiff and guarded against it. Taking into consideration the condition of plaintiff when he was taken to the hospital, that he was unconscious and oblivious to all his surroundings, and yet physically able to get up and tumble about, it was very easy to foresee the possibility of the result which came to this plaintiff with an open gas fire burning in the room by leaving him to look after his own safety. A hospital is not an insurer of its patients against injury inflicted by themselves, or that a patient in a hospital must be attended continuously by a nurse or other attendants, as it is claimed would be the case, as a matter of law, if the decision herein of the court below should be reversed, as indicated by defendant's counsel. On the other hand, hospitals will only be required as heretofore to use ordinary and reasonable care and diligence in the treatment and care of their patients. By what has been said, the court does not express an opinion as to the weight of the evidence any further than that it was sufficient to go to the jury for their consideration. The court erred in striking out the evidence.

We therefore reverse the judgment, and remand the case to the circuit court of Harrison county for further proceedings to be had herein.

MALPRACTICE MAY BE PLEADED TO DEFEAT CLAIM FOR FEES

VANDENBERG v. SLAGH, 114 N. W. REP. 72 (MICH.) DECEMBER, 1907.

Case made from circuit court, Ottawa county; Phillip Padgham, Judge.

Action by John W. Vandenberg against Conrad B. Slagh for medical services. Judgment for plaintiff. Case-made. Reversed, and new trial granted.

Argued before McAlvay, C. J.; and Grant, Blair, Montgomery, Ostrander, Hooker, Moore and Carpenter, J. J.

OSTRANDER, J. The only question presented by the record is whether under the pleadings the evidence tending to prove malpractice should have been submitted to the jury. It is the theory of defendant that the malpractice alleged may and should defeat in whole or in part a recovery by plaintiff. None of the requests preferred indicate a claim on the part of defendant to recover against plaintiff a judgment for damages. The entire subject of malpractice was withdrawn from the jury. Under proper pleadings malpractice may be proven for the purpose of defeating a claim for services rendered by a physician or surgeon. McLure v. Hart, 19 Ark. 119; 16 Ency. of Pl. A. Pr. 534; Howell v. Goodrich, 69 Ill. 556; McKelroy 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775; Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, 45 L. R. A. 541, 71 Am. St. Rep. 469; Bellinger v. Craigue, 31 Barb (N. Y.) 534. Patten vs. Wiggin, 51 Me. 594, 81 Am. Dec. 593; Whitesell v. Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830. Our statute, Comp. Laws, Sec. 10, 426, reads: "If any person professing or holding himself out to be a physician or surgeon shall be guilty of any malpractice, an action on the case may be maintained against such person so professing, and the rules of the common law applicable to such actions on the case, and such malpractice may be given in evidence in bar of any action for services rendered by such person so professing." The action was begun in justice's court, the pleadings were oral, the notice of special defense as it is set out in the record was "of recoupment for the negligent manner in which plaintiff performed the services for the recovery of which this suit is brought, to-wit, setting the broken arm of defendant's minor son in such a negligent manner that he is unable to perform manual labor for the defendant, to the defendant's damage of three hundred dollars or under."

This notice and the testimony introduced by both parties put in issue the negligence (malpractice) of the plaintiff and the assisting physicians. The record shows that the defendant's evidence tended to show that, if the result had been a good arm with a flexible elbow joint, the price of $125 (the amount of the various items of charges made) would not be unreasonable, and the testimony also tended to show that if the arm, on account of the negligence of the plaintiff and his assistants, was a stiff arm, the price of $125 was unreasonable. Each of the requests to charge sought to have the testimony applied to the determination of the right of plaintiff to recover; the second request correctly applies the law to the facts if the claim of the physicians was apportionable, the others as correctly state the law if it was not apportionable.

In my opinion, the requests to charge should be treated as a limitation of the demand of defendant under his notice of recoupment rather than as advancing a new and special defense of which no notice had been given. Any other ruling would rest upon technicality which the rights of the plaintiff do not require to be employed. Defendant's second request should have been given, and it was error to say

to the jury, after explaining to them a theory of defendant's claim of recoupment which did not include the point here discussed, that (I quote from the charge) "In that view of the case my idea is, it is unnecessary to go into this question and leave this to you, whether the injury of this arm has been well attended to or whether it has not."

The judgment should be reversed, and a new trial granted.

PLEADING IN ACTION FOR MALPRACTICE

BLACKBURN'S ADM'R. v. CURD. 106 S. W. 1186 (KY.) JAN. 1908.

Appeal from Circuit Court, Bell county.

"Not to be officially reported."

Action by Leon Blackburn's administrator against T. H. Curd. From a judgment dismissing plaintiff's petition on demurrer for want of facts, he appeals. Reversed and remanded.

O. V. Riley, for appellant. Sampson & Sampson, for appellee.

NUNN, J. This appeal is from a judgment rendered in the Bell circuit court, sustaining a demurrer and dismissing appellant's petition for the reason that it did not state a cause of action.

Omitting the formal parts, the petition is as follows: "Plaintiff says that the defendant, T. H. Curd, is a regular licensed and practicing physician of Bell county, Kentucky, and was such a physician at all times mentioned in this petition. Plaintiff says that said decedent (Leon Blackburn) was a stout, able-bodied person, and in good health, but had a growth upon his head, which the defendant after an examination therefor pronounced a tumor; that said growth was on the right side of the top of the head, and was about the size of an egg; that the defendant, after examining same, advised his intestate to have it removed, and assured him that the removal thereof would not endanger his life or health, or give any trouble longer than a few days—at most not longer than two weeks; that after the said examination and assurance by the defendant his intestate in the month of July, said year, engaged the defendant to perform said operation and intrusted same to him; that the defendant performed said operation and undertook the treatment of deceased after said operation was performed, and for that purpose had his intestate visit his office and he visited the home of said decedent. Plaintiff said that the directions given by the defendant as to the care and attention to be given the incision on the head of the deceased, where said operation was performed,were carefully followed by the deceased and the members of his family; that the services of the defendant in the treatment of the deceased were continued and exclusively relied on by the decedent and the members of his family until the defendant failed to attend decedent when sent for for that purpose, and neglected to properly or at all to treat the decedent for several days, to-wit, three days, during which time defendant was sent for to attend deceased, and was notified by the messenger sent after him that deceased was suffering greatly and badly in need of proper attention by the defendant; that defendant failed and refused to attend or treat deceased during said three days, and because of said failure and his neglect to bestow proper and ordinary care, skill, and diligence upon the deceased after said operation was performed and during said three days his intestate got into such a condition from the effect of such failure and neglect that he was beyond any relief which other medical or surgical aid could render and died therefrom on the eighth day of September, 1905. Plaintiff says that through and by

reason of the carelessness and negligence of the defendant his intestate lost his life, to the damage of the plaintiff in the sum of $10,000.

Appellee, by his general demurrer, admitted every material fact alleged in the petition. His counsel contends that the petition is defective and insufficient, for the reason that it was only alleged that the directions given by appellee as to the care and attention to be given the incision on the head of deceased, where the operation was performed, were carefully followed by the deceased and the members of his family; that this limited the case and attention to the wound on the head and the directions of appellee with reference thereto; that this language implies that appellee gave other directions which were not followed. In our opinion this point is not well taken. The incision on the head of deceased made by appellee was the thing to be treated by appellee, and it is to be presumed that the directions of appellee with reference to the care and attention were all given to that end, and as to the effect of the allegation in the petition that those directions were followed by deceased and the members of his family it was not necessary to allege minutely all the directions and advice given to accomplish a cure.

The second proposition is that the petition is insufficient for the reason that it was not alleged that another physician could not be obtained to treat deceased when appellee failed to treat him. A contract, or such a state of facts as made it obligatory upon appellee to continue to treat deceased, were alleged, and that he failed to comply therewith and render the proper and necessary treatment to the deceased, by reason of which failure deceased was injured. This stated a cause of action against him. The matter contended for may be pleaded by appellee.

For these reasons, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent herewith.

MALPRACTICE—AUTHORITY OF PHYSICIAN TO SUBSTITUTE ANOTHER PHYSICIAN IN HIS PLACE

GHERE v. ZEY, 107 S. W. 418. (Mo.)

ELLISON, J. The defendant is a physician and surgeon, and was employed to serve plaintiff professionally. Plaintiff brought this action for malpractice, and recovered judgment in the trial court.

It appears that plaintiff was driving when his horse became frightened at an automobile, and he was thrown from his vehicle; his leg being broken from the fall. Defendant was called, and the charge is that he so negligently and unskillfully performed the service required in and about the broken leg as to cause it to be "impossible to get a perfect union and to get the leg properly extended, as a result of which said leg has been materially shortened, and plaintiff rendered a cripple for life." Though the case seems to have been sharply contested, and though the record presented here is quite large, yet there appears to be little in the case which is the province of this court to determine. The record discloses that there was evidence which, if believed by the jury, tended to support the plaintiff's theory and charge of negligent treatment; and, upon the other hand, there was evidence tending to sustain defendant's defense of proper professional skill and diligence in the treatment rendered. In such situation it is settled law that the jury must determine the facts and render a verdict in accordance with their belief. The sole province of the court on appeal is to ascertain whether the trial court committed error in admitting or rejecting evidence, or in giving or refusing instructions.

Though the evidence is voluminous, there is but one complaint on that head, and that is where the court struck out a statement made by defendant that he "was interne for the City (St. Louis) Hospital. The assistant in the medical college there is something every medical student works for. That is the height of their ambition." That was properly stricken out. It was not responsive to the question and was argumentative in character.

There were 10 instructions given. It does not appear that they were asked by either party, they seem to have been given by the court of its own motion, and they perhaps were, as they fully present the law of the case on the theory as advanced by both plaintiff and defendant. The defendant only excepted to the action of the court in giving Nos. 1, 2, 3, and 4, and, though others are discussed, we cannot notice them. It is urged that instruction 1 is too general, and that it should have only required defendant to have exercised the ordinary skill of physicians in the locality where he practices. The instruction, while not using those words, did limit the skill to that "ordinarily used by competent physicians and surgeons under like circumstances and conditions." This we think was proper, and is the substance of what defendant contends for, so that we need not determine the correctness of defendant's position. Instruction 2 is said to be too general in not limiting the damages. But we find it to be perfect in so far as it goes; and, if defendant wished one more specific, it was his duty to ask it and to except if refused. Browning v. Railway Co., 124 Mo. 55, 27 S. W. 644. This case has been uniformly approved by the supreme and appellate courts. The objection to instruction 3, concerning a claim for following out defendant's directions, is that no claim of that nature is stated in the petition. This we think an erroneous construction of the petition, and we regard the instruction as proper. Instruction No. 4 informed the jury that under defendant's employment he had no right to substitute any other person to take his place in treating plaintiff without the latter's consent. There was evidence in the case upon which this instruction was based, and it was proper to give it. The defendant was contemplating a trip to Europe and that he would leave another physician in charge of plaintiff. Plaintiff refused the offer, and employed others.

Exception was taken to remarks of one of plaintiff's counsel in argument as not being warranted by the evidence. The trial court did not seem to consider them harmful. Nor do we understand how they could have affected the mind of the jury as to the merits of the case. Besides, the only reference to this in the motion for new trial is that "the court erred in not reprimanding counsel for plaintiff for improper and prejudicial remarks in his closing argument." The court was not asked to reprimand counsel. There was no complaint made at the time the remarks were uttered that they were prejudicial; and, as already stated, we think they were not.

Finally, complaint is made of the refusal of two instructions offered by defendant. The first one, in part, was already, in effect, embodied in those given. The remainder amounted to a comment on a particular part of the evidence. The entire substance of the second one was embraced in those given. We think the jury could not have failed to understand the issues presented.

An examination of the entire record satisfies us that we have no right to interfere with the judgment, and it is therefore affirmed. All concur.

EVIDENCE SUFFICIENT TO SUSTAIN VERDICT IN ACTION FOR MALPRACTICE

THOMPSON v. MARTIN 106 S. W. 535 (Mo.) DECEMBER 1907.

BROADDUS, P. J. As the appellant's statement is not controverted by respondent, and as it states the case sufficiently full for an understanding of point relied on for reversal, we will adopt it as a matter of convenience. The appellant is a practicing physician of Kansas City, Mo. The respondent, now about 43 years of age, was, in 1903, working as a janitor at one of the public schools of Kansas City. In November of that year he was having trouble with his eyes. This trouble was granulated lids and an ulcerated condition of the eyes. He called in the appellant to treat him. The appellant prescribed a 2 per cent. solution of corrosive sublimate to be used as a wash. The respondent contended that he used the medicine and that it made him blind, and that his blindness had continued up to the time of the trial—more than two years after the medicine was used. The appellant contended that he gave the respondent oral instructions to put one-third of a dropper full of the medicine in a half tumbler of water, and use it so diluted. This was denied by the respondent. The respondent brought his suit alleging that the carelessness and negligence of appellant in prescribing a poisonous and dangerous medicine had resulted in the respondent being made permanently blind, and asked judgment for $25,000. The respondent introduced the testimony of three witnesses—that of himself and of two physicians. Respondent testified that he was totally blind in one eye, and that with the other he could not recognize members of his own family, and could not see the members of the jury, nor see where the jury was located. One physician on behalf of the respondent testified that the medicine prescribed, if used undiluted, would destroy the sight of the eyes; and that respondent was practically blind, and would never recover vision enough to follow any trade or occupation, or read a newspaper. The other physician on behalf of respondent testified that the medicine prescribed, if used undiluted, would destroy the sight of the eyes. The appellant introduced the testimony of four physicians, who were experts in treating diseases of the eyes. Each testified that in a case of ulcerated eyes it would be proper to use the medicine prescribed in undiluted form for a few times, and that no injurious effect would follow. The respondent had already testified that he used the medicine in its undiluted form only once in the right eye, and only twice in the left eye. The jury brought in a verdict for $1,500.

The point relied on by appellant is that "the verdict of the jury shows on its face that it was not based on the law and the evidence." The jury would have been justified in finding either for respondent or for appellant, as the evidence was conflicting. This the appellant has been compelled to admit; but he contends that if respondent was entitled to recover at all, the verdict should have been for $25,000, the amount claimed. The argument is that the jury did not believe that "appellant was responsible for the unfortunate condition of respondent, but that they allowed their sympathies to lead them to try and aid him by way of a money judgment." We cannot see the force of the argument, for the reason that if the sympathies of the jury were such as to induce them to return a verdict for respondent against their convictions of right, in order to aid him by a money verdict, their sympathies would have lead them to return a larger one, and one

commensurate with the extent of respondent's injury. We can understand why a jury might allow their judgment to be influenced by sympathy to return a verdict against the evidence. But in this case the verdict for respondent is amply sustained by the evidence, and is such as might have been rendered by an impartial jury. The most rational conclusion deducible from the whole case is that the jury believed that appellant's act in giving respondent the medicine without direction to dilute it before he applied it to his eyes was to be attributed to the fact that he thought he had given such directions. The appellant, on the trial, swore that he had given such directions, and the jury might well have come to the conclusion that the appellant made an honest mistake which might account for the smallness of the verdict. Jurors are liable to make mistakes, but it is an undeniable fact that they are prone to administer equity on suitable occasions. Where nothing is shown that the jury acted from improper motives, it is the duty of the court to impute to them honesty of purpose at least, although it may be that they have been mistaken in their conclusions.

The respondent with propriety might have attacked the verdict on the ground that the sum awarded was inadequate; but as he has seen fit to acquiesce in the result, the appellant ought to be satisfied also as he is bound to admit that under the evidence a verdict in respondent's favor is supported by the evidence.

Affirmed. All concur.

NO WAIVER OF PRIVILEGED COMMUNICATIONS MADE TO ONE PHYSICIAN BY BRINGING SUIT AGAINST ANOTHER PHYSICIAN

HARTLEY v. CALBREATH, 106 S. W. 570 (Mo.)

ELLISON, J. The defendant is a physician, and in his professional capacity attended plaintiff, whose shoulder was dislocated. This action is for damages for alleged malpractice. The trial resulted in plaintiff's favor.

It appears that plaintiff was thrown from a horse and dislocated his shoulder. Defendant was called and engaged to attend him. The evidence tended to show that he reduced or "set" the shoulder, and pronounced it "allright;" that he put plaintiff's arm in a bandage or "sling" suspended from around his neck, but he did not secure the arm to the body so as to prevent the upper portion from being free to move. He returned next day, when plaintiff complained of severe pain. He then took off the bandage, or, as otherwise expressed, took it out of the sling and left it free. Plaintiff continued to suffer great pain, and his shoulder not appearing to be doing well, he was at defendant's office and there, in the presence of another physician, the shoulder was examined, and not being thought to be in proper place, another effort was made. Afterwards yet another effort was made by the use of "pulleys." But after all, according to the evidence in plaintiff's behalf, the shoulder was not properly reduced or "put in place," whereby he has lost much of the use of that arm and has suffered great pain.

Plaintiff's theory is that defendant either failed in the first place to reduce the dislocation, or, if he did reduce it, that he left it so improperly bandaged and cared for as that his arm had too much freedom of movement, and the shoulder would not remain in place, and that he was negligent and unskillful in not sooner discovering that the shoulder was not properly reduced, and using immediate means to put it in proper condition.

The defendant offered Dr. Powell as a witness. On plaintiff's objection he was not permitted to testify, on the ground that whatever he knew about the case was privileged under the statute (section 4659, Rev. St. 1899, Ann. St. 1906, p. 2539). It appears that several months after defendant's treatment of plaintiff the latter called on the witness as a physician and was examined by him. There can be no doubt of the correctness of the court's ruling. It is true that in cases of this nature, the physician being a party, the necessity of the matter makes him competent to testify in his own behalf concerning communications between himself and his patient, notwithstanding the statute. Cramver vs. Hurt, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752. Otherwise the physician might be without means of protecting himself. And so a consulting physician has been held competent to testify concerning those things which transpired at the consultation. This was put upon the ground that the plaintiff himself had removed the privilege of secrecy. Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111 25 Am. St. Rep. 442. Some of the language used in the opinion in that case is perhaps broader than would be justified by the views entertained in this state; but, restricted as we have stated, we believe it a proper statement of the law as held by our courts. In this case the defendant and consulting physician were permitted to testify without objection. But the offer of Dr. Powell in defendant's behalf brings up altogether different considerations. He was in no way connected with defendant's attendance upon the plaintiff. He examined plaintiff in his professional capacity, with a view to seeing what could be done for him. Defendant does not answer this position by saying that the secrecy of the whole matter has been removed by the plaintiff bringing the present action and himself testifying, and by his having made it necessary for the defendant to testify, and therefore the privilege did not longer exist; for the secrecy and privilege of the communications to Powell had not been removed. It has been directly held by the Supreme Court that a waiver as to one physician is not a waiver as to others who may have attended upon the person making the waiver. The statute, says the court, "does not exclude the evidence by reason of its inherent character, but only when given by the persons within its purview." Mellor v. Railway Company, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Barker v. Cunard Ship Co., 91 Hun, 495, 36 N. Y. Supp. 256, affirmed in 157 N. Y. 693, 51 N. E. 1089. We held in Arnold v. Maryville, 110, Mo. App. 254, 85 S. W. 107, that the statute in privileging all necessary information and communications received by the physician from the patient did not apply to a physician who was called upon, not with a view of giving the patient attention and relief, but for the purpose of qualifying himself as a witness. But in this case the trial court and counsel first ascertained from Powell that nothing was said between him and plaintiff about a suit, or his being a witness, but that he was consulted with a view to "relieve him (plaintiff) of his distress."

Defendant, in support of his view that the bringing of the suit by plaintiff waived all privilege conferred by the statute, cites the following from 4 Wigmore on Evidence, Sec. 2389 (the italics are the author's): "In the first place, the bringing of an action in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be discolsed to the world at large; hence the bringing of a suit in which the very declaration, and much more of proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnacy to disclose does not exist. If the privilege means anything at all in its origin, it means this as a sequel. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: "One month ago I was by the defendant's negligence severely injured in the spine, and am consequently unable to walk. I tender witnesses A. B. and C. who will openly prove the severe nature of my injury. But, stay, witness D. a physician, is not, I perceive, called by the opponent to prove that my injury is not so severe as I claim. I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it forever secret if the court will forbid his testimony." It will be observed that the author seems to consider an exposure of the mere ailment by bringing the action is sufficient to entirely remove the bar of secrecy. But we regard his view as being much too restricted. The object of the statute is not fully met in all cases by merely keeping secret the fact that a patient had a certain ailment. If the matter of public knowledge of the existence of the particular ailment is to be considered as measuring the extent of the privilege and the full breadth of the statute, there would be much less necessity for the law than has been supposed; since the mere cause of a physician's on his patient is, perhaps, in the great majority of instances, known to the public, or, at least, to as many of the public as would hear it in a courtroom. The primary object of the statute is the relief of the patient, and to that end it has made the way clear for him to permit a complete examination and to give full and free communication of everything connected with his ailment which may be necessary to enable the physician to prescribe for him. Arnold v. Maryville, supra. And those things are as securely included in the purview of the statute as the ailment itself. And an exposure of the ailment does not necessarily release secrecy as to them. That the author's view as quoted above, is too restricted, may be illustrated. Suppose a physician on being called to attend a patient for an ailment about which itself there is not desire for secrecy, finds it necessary to examine his body and so informs him. He has upon his body a scar or other defect, wholly disconnected from the ailment on account of which the physician was called, which would be material evidence against him in the trial of some cause, civil, or criminal, to which he was a party. If the physician is at liberty, or may be compelled, to testify to what he observed, or what was told him in relation thereto, the patient might refuse to be examined, and thus deprive the physician of necessary information, and thereby, possibly, lose his life. Again, it is well known that for the same ailment different persons, on account of being or not being, or of having been or not having been, afflicted with

other complaints, must be treated in different ways, or with different medicines. In these instances, and numberless others, the statute gives the patient free conduct and free tongue with his physician to the end that the latter may have full information for his relief and restoration. So it seems to be perfectly manifest that it is not alone the mere fact of a particular ailment which the statute intends that the physician shall not give in evidence, but its purpose is to protect all else which may have been communicated to him to enable him to intelligently prescribe.

But we are told by defendant that the Supreme Court in the case of Cramer v. Hurt 154 Mo. 112, 55 S. W. 258, 77 Am. St. rep. 752, has decided that the bringing of the action was a waiver of the privilege of the statute, thereby, in effect, overruling Mellor v. Railway Company, supra. We do not think so. There is a remark to the court at page 121 of 154 Mo., at page 260 of 55 S. W. (77 Am. St. Rep. 752), which gives some color to defendants claim. But the point decided in the case was that a physician, when sued for malpractice, from very necessity, should not be held to be included within the terms of the statute. Otherwise, as before stated, he would be at the mercy of his patient. It was further held that in actions for damages brought by the husband for an abortion committed on his wife, Public Policy justified the admission of the wife's testimony as to matters connected with the attendance and acts of the physician. It being thought that knowledge that the statute did not apply to the wife in such case would operate to discourage such unnatural practice. After thus disposing of the case, the court made the remark upon which defendant relies, as follows: that if an action is brought by a woman against her physician "for physical injury occasioned by his want of knowledge, or negligence in her treatment, then the privilege of secrecy on the part of the defendant would thereby be waived as to all matters connected with the case and his treatment thereof." But that was said of an action, the very nature of which discolsed all that was desired to be kept secret, viz., an abortion on a woman. That case is not authority for the claim that the mere bringing of an action of itself destroys the privilege of the statute to anything more than those things which the action itself makes necessary to disclose. That no more than this was said or decided in that case is shown by the subsequent case of Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89, the opinion written by the same distinguished judge. In that case this general subject is elaborately discussed, and yet it is nowhere intimated that the mere bringing of an action for injuries received from a fall on a sidewalk would waive the privileges of the statute as to testimony of the physician who treated the injuries. There are some diseases, or other ailments, which are considered to be a disgrace to those afflicted; and others, while not disgraceful, would be considered humiliating; and still others that would annoy a supersensitive person. If bringing the action exposes the secret to the public, the privilege of the statute is waived as to the existence of the ailment and its treatment, and communications necessarily connected with it, and this is all that is decided in Cramer v. Hurt, supra. The plaintiff by bringing the action waives the statute no further than the action discloses, viz., the ailment and its treatment by the physician or physicians therein named. It does not waive the privileges as to other physicians. If the privilege is waived as to other physicians called, as was the witness under

discussion, disconnectedly from the defendant, it must be by some act of the plaintiff in himself disclosing what took place with such physician by calling it out in evidence. We have already stated that in this case the defendant and the consulting physician with him were permitted to testify. But when it came to defendant's offer of Dr. Powell, who afterwards examined plaintiff, there was no waiver as to him, and hence we approve the trial court's ruling excluding him.

We have examined the instructions given in the case, as well as those refused for defendant. We regard them as applying correct principles of law to the facts which the evidence tended to prove. The demurrer to the evidence was properly rejected, since there was ample evidence, if believed by the jury, to support the case stated. The elaborate argument on that instruction in defendant's behalf, oral and written, is faulty by reason of its ignoring what was shown in plaintiff's behalf and proper inferences to be drawn therefrom. All of the instructions asked for defendant were given, save three. They liberally covered every proper theory of defense. No. 7 was well refused. It is so worded that it practically assumes that defendant employed ordinary treatment for the shoulder. No. 8 was faulty in that, in effect, it excuses the defendant for not using proper bandage, if the shoulder was not reduced, even though it may have been defendant's negligence which prevented its being reduced. As worded, it was well calculated to confuse and mislead. No. 9 likewise had the fault of assuming matter in defendant's behalf. As written, it assumed that defendant gave plaintiff recognized and ordinary treatment. It related to one theory of defense that the shoulder could not be reduced by the ordinary, recognized treatment, and that defendant then asked to make an incision which the plaintiff refused to permit. A full proper instruction on this defense (No. 12) was given at defendant's request. We are satisfied that the instructions for plaintiff were so guarded, and those for defendant so full and complete, that no possible phase of the proper defense was kept from the jury. The result is an affirmance of the judgment. All concur.

ON REHEARING.

We are asked to grant a rehearing in this case or, in case that it is refused, that we certify the cause to the Supreme Court on the ground that the foregoing opinion is in conflict with the case of Cramer vs. Hurt, 154 Mo. 112, 55 S. W. 258 77 Am. St. Rep. 752, discussed by us. During the pendency of this motion the case of Smart vs. Kansas City has been decided by the Supreme Court, in an opinion by Judge Woodson, reported in 105 S. W. 709, published November 6, 1907, in which it is shown that Cramer v. Hurt does not bear the construction for which defendant contends and from which it will be seen that the Supreme Court entertain views in regard to the citation from 4 Wigmore's ev. Sec. 2389, substantially like those to which we have given expression. Thus finding ourselves supported by the Supreme Court in regard to the principal contention of the defendant, we must overrule the motion for rehearing.

FACT THAT A PHYSICIAN TREATED A PATIENT PROFESSIONALLY DOES NOT PREVENT HIS TESTIFYING AS AN EXPERT

(ANDERSON v. RAILWAY CO., 114 N. W. 544, MINN.)

LEWIS, J. This was an action to recover damages for injuries sustained by respondent in a collision which occurred

on appellant's railway. Respondent recovered a verdict. Appellant made application to the trial court upon proper notice for the allowance of witness fees of certain physicians claimed to have been called as experts at the trial. This appeal involves the single question whether the court was in error in allowing the witnesses expert fees.

At the hearing here and in the court below appellant claimed that it was held in Le Mere v. McHale, 30 Minn. 410, 15 N. W. 682, that physicians could not be called as experts when they had been employed professionally to attend the plaintiff, and while so attending him, in the ordinary practice of their profession, acquired personal knowledge of the nature and extent of his injuries. An examination of the record in that case discloses that the physicians testified they had treated the injured man, and they described the nature and extent of his injuries; but, if they were called as experts to give opinions upon a given state of facts, the record does not discolse the fact. Whatever opinions were expressed were incidental and exceedingly limited. In speaking of the case, the court said that the statute allowing expert witness fees did not apply to cases where a witness skilled in some profession or calling was asked to testify as to facts within his personal knowledge, although he may have acquired such knowledge while in the ordinary practice of his profession, and although his professional skill might have enabled him to observe such facts more intelligently and to narrate them more correctly. The court added: "It is true that, after testifying to these facts, they were asked for and gave their professional opinion in reference to the probable effect upon plaintiff of the injuries, the extent and nature of which had come to their knowledge while attending their patient in the ordinary pursuit of their calling. We are not prepared to say that this might not bring them technically within the letter of the statute; but it certainly did not, under the facts of this case, bring them within its spirit, and furnished no good reason for allowing them extra compensation."

In the case before us none of the testimony is returned, and we are limited to a consideration of the facts as they appear in the motion papers. It certainly was not intended to hold in Le Mere v. McHale, that simply because physicians and surgeons treat an injured person in their professional capacity, they are thereby precluded from being sworn and examined at the trial as experts to give an opinion upon the facts, whether those facts were ascertained wholly or partially as a result of their personal experience in treating the patient. That decision goes no further than to hold that a physician who testified to facts coming under his notice during the performance of his professional duties is not necessarily an expert witness. In that case there was nothing to distinguish the physicians from any other witnesses. In this case it appears from the motion papers that the physicians and surgeons not only treated the injured man professionally, but were employed so to do for the purpose of making preparation to testify as experts. They made special examination of his injuries, with the intention of acquiring knowledge which should make them the better qualified to testify as to what were the probable results of the injury. The trial court, having heard all of the evidence, was in a much better position to pass upon the question than this court can be upon the record before us. Of course, applications of this kind should be carefully scrutinized by trial courts. The statute was not

intended to furnish a plaintiff the means of procuring medical treatment at the expense of the party charged with negligence.

Affirmed.

ELLIOTT, J. I think that this case is controlled by Le Mere v. McHale (30 Minn. 410, 15 N. W. 682, and therefore note my dissent.

BOARDS OF HEALTH ARE ADMINISTRATIVE AND NOT JUDICIAL BODIES

STATE v. ADCOCK 105 S. W. REP. 270 (Mo.)

Relator, Dr. A. S. McCleary, graduated from the Eclectic Medical University, of Kansas City, Mo., March 24, 1904, and received his diploma therefrom on that date. This school is duly incorporated under the laws of Missouri, and has a four years' course of study. He claimed to have been a matriculant in said school in the fall of 1900, and therefore prior to March 12, 1901. On or about November 27, 1906, he presented to relators all the evidence required by the act approved March 21, 1903 (Acts 1903, p 241, ‡ 0), to entitle him to a license from respondents, who constitute the state board of health to practice medicine and surgery in the state of Missouri. Relator on said date tendered to respondents the required fee under the statute, but respondents refused to grant to relator a license, and thereafter relator applied to this court for a writ of mandamus, and the alternative writ was duly granted. Among other things stated in the alternative writ, we find "That said board of health of the state of Missouri has failed, neglected, and still fails and neglects, to issue to relator a license to practice medicine in the state of Missouri; that said board is composed of seven physicians, five of whom are allopathic physicians; that said board is biased and prejudiced against relator; that relator is a matriculant and graduate of an Eclectic School of Medicine; that a majority of the members of said board of health belong to the regular or allopathic School of Medicine, a school or system of medicine entirely different and opposed to the school or system of medicine of which relator is a matriculant and graduate; that the school of medicine of which a majority of five of said members of said school board belong are opposed and averse to giving relator a license to practice medicine in the state of Missouri, because relator is a matriculant and graduate of a system of medicine differing from the system of medicine of which a majority of the members of said state board of health are graduates." The return of respondents is in this language: "Now, on this day, come the respondents, and, for return to the alternative writ herein, admit that it is true, as alleged in the alternative writ, that the respondents constitute the state board of health of Missouri, having been duly appointed and qualified as members of said board. They admit that on the 27th day of November, 1906, the relator appeared before respondents, as members of said board of health, in Kansas City, Mo., and tendered to them the sum of $15, the fee allowed by law. They admit that the relator then and there produced satisfactory proof of his good moral character; and they admit that he then and there produced satisfactory evidence that he graduated from the Eclectic Medical University on March 24, 1904, and received a diploma, properly signed by the officers and professors in said university, which diploma was dated March 24, 1904. But the respondents deny that the relator produced to them satisfactory proof that he matriculated in the Eclectic Medical University, or in the medical department

of any university, school, or college prior to March 12, 1901, and for further return respondents say that relator produced before them at said time and place a paper which purported to be signed by an officer of said Eclectic Medical University, and which purported to be a receipt for the matriculation fee of relator in said university, and which purported to be signed November 12, 1900; that upon careful inspection of said receipt with a microscope it was discovered that the same was originally dated November 12, 1901, and that the same had been changed to 1900; that the relator produced before them certain affidavits, purporting to have been signed by teachers in said university, which affidavits stated that the relator had attended lectures in said university in the fall of 1900; that they examined certain records and papers of said university, but failed to find the name of relator in the list of scholars of said university for the year 1900. Respondents further say that they are not satisfied with the evidence so produced before them that the relator matriculated as a student in said university prior to March 12, 1901; and, upon the evidence so produced, declined to issue a license to relator to practice medicine in Missouri, and, further, respondents deny each and every other allegation in the alternative writ. Wherefore, the premises considered, respondents pray that no peremptory writ of mandamus issue herein, that the alternative writ be discharged, and that respondents be awarded their costs herein." The reply to this return is a specific denial of all new matter in the return. Hon. A. L. Cooper was appointed commissioner by this court to take the testimony, and, after so doing, he has made a report in which there is a finding both of fact and law, accompanied with all the testimony in the case. The report is one evidently prepared with great care. The report concludes as follows: "My findings and conclusions are, therefore, as follows: (1) The relator did matriculate in the Eclectic Medical University of Kansas City, Mo., prior to March 12, 1901, and established that fact by the great weight of the evidence both at the hearing before the board of health and before me. (2) The board of health did not give to the relator's evidence the weight and consideration to which it was entitled, and in that respect acted without due regard to the legal rights of relator. (3) I find, and the pleadings admit, that he had complied with all other conditions required by the statute. I therefore respectfully recommend that the peremptory writ prayed for be issued." We have gone through the evidence, and the conclusions of the commissioner, as to the facts, are the only ones which could have rightfully been reached. As to the law, we will discuss that in the course of the opinion.

J. A. McLane, for relator. The Attorney General and N. T. Gentry, for respondents

Graves, J. (after stating the facts as above). An examination of this record shows that the overwhelming evidence, both before the commissioner and previously before the state board of health, is to the effect that relator had matriculated in the Eclectic Medical University of Kansas City, Mo., prior to March 12, 1901. All other requisites for a license stand admitted by the return. In other words, the only disputed question is: Was the applicant, Dr. McCleary, a matriculant in said school prior to March 12, 1901? If he was, he was entitled to his license. If he was not, then it was properly refused.

Relator bottoms his right to a license on the act of 1903, approved March 21, 1903, in words as follows:. "It is not in-

tended by this act to prohibit gratuitous service to and treatment of afflicted and this act shall not apply to commissioned surgeons of the United States army, navy and marine hospital service, nor to any student who has matriculated in a medical college on or prior to March 12, 1901, and it shall be the duty of said board of health on receiving a fee of fifteen dollars from said student to issue to him a license to practice medicine when said student presents a diploma from any medical college of this state." Under the facts of this case, and under this law, the only thing for respondents to do was to rightfully determine the question as to whether or not the relator was a matriculant in this school prior to March 12, 1901. On this question the respondents held adversely to relator. We are therefore required to face the question as to whether or not this finding of the respondents is final, and not subject to review in this court. Respondents claim that they exercised their discretion on this question, and that their judgment is final. If so, there is an end to this cause; but in this we do not assent to the contentions of respondents. Discretions must always be reasonably exercised. As to whether or not they are reasonably exercised is a question for the courts. The statute requires the issuance of a license upon a proper showing, and it is not within the power of the board of health to arbitrarily refuse it. In the case at bar, the sole and only question for respondents to determine, under the admissions in the pleadings before us, was as to whether or not the relator had matriculated in the medical college mentioned above prior to March 12, 1901. Now, if the board of health, against all the rules of evidence and against the great weight of the evidence, as evinced by this record, arbitrarily refuse to grant the license, will mandamus lie to compel them to do so? This is the sole contention of respondents. They claim that they have exercised their best judgment, and, having done so, the incident is finally closed. Does the law place in the hands of administrative boards such arbitrary power? We think not. If so, the courts are not open to the aggrieved, if such there be, and this case is wrongfully here. If so, such boards can arbitrarily refuse any applicant the rights prescribed by the law, and he is without remedy. If so, such a board can hear the evidence, and against all of the evidence place its ipsi dixit, and refuse to the applicant the privileges granted by the law. Such a doctrine is not consonant with reason, and is not the law. Grant it, for the purposes of this case, that these boards are clothed with discretionary powers, yet an unwarranted exercise of that discretion is a subject-matter for review. They are not judicial bodies. State ex rel. v. Goodier, 195 Mo., loc. cit. 560, 93 S. W. 928. In that case this court said: "The duties of the board are of an administrative or ministerial character, and therefore as long as its acts are within the scope of the exercise of a reasonable discretion, it is free to act. State ex rel. v. Gregory, 83 Mo. 123, 53 Am. Rep. 565. If, perchance, through a misunderstanding of the law the board should refuse to perform a given duty, the writ of mandamus will right the wrong. State ex. rel. v. Lutz, 136 Mo. 633, 38 S. W. 323. But the writ of prohibition does not go against such a body. It goes only against a court or tribunal exercising judicial functions. We have very recently held that a writ of prohibition would not go against the board of election commissioners, because, although it exercised a large discretion (in the case there under review having to investigate and find from the evidence

and decide which of two antagonistic sets of claimants was entitled to recognition as the lawful committee of a political party), yet it was the act of a ministerial and not a judicial body, and the act to be performed was not a judical act. Kalbfell v. Wood, 193 Mo. 675, 92 S. W. 230."

But even if it were a judicial tribunal, and its discretion was arbitrarily exercised, such action would be subject to review. We have always so held in matters of granting a continuance and similar matters and a citation of cases would be superfluous. In the case at bar there is no remedy by appeal, and the only remedy is the one invoked in this case. But beyond all this, and decisive of this case, the board acts ministerially in a matter of this kind. If the conditions exist, the license must be granted. If the conditions exist, there is no discretion, but the license must be issued. If the board cannot act judicially as held in the Goodier Case, supra, this case resolves itself into the plain proposition—do or do not the conditions exist? If so, the license must go. The great weight of the evidence shows that the relator had matriculated prior to March 12, 1901, and, such being the case, the peremptory writ of mandamus must go.

We conclude by saying that boards of this character, having merely administrative and ministerial duties to perform, cannot act arbitrarily, nor against the great weight of the positive testimony upon a given question, and, if they do so act, there is redress for the party aggrieved by an action of this kind.

From these views, it follows that the peremptory writ should go; and it is so ordered. All concur.

RIGHT TO PRACTICE DENTISTRY—STATUTE REQUIRING DIPLOMA BEFORE EXAMINATION

Crow, J. E. G. Thompson, as relator, made application to the superior court of King county for a writ of mandamus to compel W. A. Fishburn, C. S. Irwin, F. R. Fisk, H. B. Brand, and E. B. Edgars, the State Board of Dental Examiners, to examine him touching his qualifications to practice dentistry in the state of Washington, and to further compel such board to issue to him a license to practice dentistry in the event that he successfully passes such examination. The defendants interposed a demurrer to his affidavit, which was sustained by the trial court. Thereupon the relator declined to plead further, and an order of dismissal was entered, from which he has appealed.

It is not necessary to state the allegations of the affidavit upon which the appellant based his application for the writ, as the only defect sought to be reached by the demurrer was appellant's failure to allege that when he filed his application, paid his fee, and presented himself for examination, he also presented to the respondents his diploma from some dental college in good standing, with satisfactory evidence of his rightful possession of the same. It is not contended by the respondents that appellant's affidavit is defective for the want of any other allegation, and for the purposes of this case it is conceded that he has no such diploma. Section 3025, 3 Ballinger's Ann. Codes & St. (section 4467, Pierce's Code), provides that: "Any person or persons seeking to practice dentistry in the state of Washington * * * after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the State Board of Dental Examiners, and at the time of making such application shall

pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No persons shall be eligible for such examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful possession of the same. * * * " The appellant's only contention is that the provision of the above section requiring him to present his diploma as a condition precedent to taking the examination is unconstitutional and void. He has alleged that he has sufficient skill, learning, and experience to enable him to pass any reasonable or proper examination and fit him for the practice of dentistry. He does not question the right of the state to regulate the practice of dentistry, and and thereby protect the public from ignorant and incompetent persons who may wrongfully and fraudulently announce themselves as qualified and skillful practitioners. In fact, he substantially concedes that the Legislature may, by reasonable enactments, provide appropriate regulations under which only such persons as are competent may be authorized to practice. Appellant's apparent position is that, while a valid statute might be enacted requiring him to either pass an examination or present a diploma from some dental college in good standing, it cannot compel him to do both without invading his constitutional rights. In other words, he contends that, if he has as admitted by the demurrer, sufficient skill and knowledge to fit him for the practice, and is able and willing to pass the examination, he cannot also be required to present a diploma to the board as a condition precedent to being permitted to take such examination. The statute makes the same requirements of all applicants for examination. No favored or preferred classes are created or recognized. An applicant who holds a diploma must also pass the examination. Rightful possession of his diploma does not of itself authorize him to practice, or entitle him to a license. The requirement for both diploma and examination as a test of knowledge and skill is not such an unreasonable or arbitrary one as to invalidate the statute. The right to determine what requirements must be met by an applicant is within the exclusive province of the Legislature. This statute was considered in the case of In re Thompson, 36 Wash. 377, 78 Pac. 899, in which it was attacked as unconstitutional, and sustained by this court. Without further discussion, we now adhere to the ruling then made. The appellant contends that case is not in point on the question now presented, but we fail to see any substantial distinction in the principles involved.

The judgment is affirmed.

Hadley, C. J., and Root, Fullerton and Mount, JJ., concur.

BASIS OF EXPERT TESTIMONY

MASTELLER v. RAILWAY CO. 114 N. W. REP.—757 (MINN.)

LEWIS, J. This action was before this court upon a former appeal (100 Minn. 236, 110 N. W. 869), where a statement of the facts will be found. The present appeal presents two questions:

1. Several physicians testified as experts in behalf of plaintiff. One of the hypothetical questions contained a statement of the collision of the two hand cars, the rate of speed at which it was propelled, how respondent was riding, how he was thrown against the handle bars and upon the ground and thereby ren-

dered unconscious, the time he was confined to his bed, the fact that he was unable to perform any manual labor, that prior to that time he had received no other injuries and was in good health, and closed as follows: "Q. * * * That, taken in connection with what you found, the objective symptoms,not including anything which plaintiff may have said to you, what would you say as to the cause of his condition?" Dr. Boehm had already testified that he had made personal examination of respondent, and that in his opinion two ribs had been fractured in the accident, and as a result inflammation of the pleura had set in and developed certain adhesions. Objection was made to the hypothetical question upon the ground that it did not contain all of the important facts in the case. The facts which were omitted from the question were those testified to by the doctor as to what in his opinion took place as the result of the accident, viz., inflammation of the pleura and the development of adhesions. We think the question was not open to the criticism named. It was so framed as to include all of the important points in the accident and what took place up to the time of the personal examination of the witness. Having testified as to what those symptoms were, there was nothing misleading in referring to them as objective symptoms, without setting them out in detail in the question. Practically the same objection was made to the other hypothetical question propounded to other witnesses. Although they varied somewhat in detail, there was no substantial omission of evidence. It is not the rule that under all circumstances a hypothetical question must contain a statement of all the material facts concerning which there is evidence. If a witness was present in court and heard the evidence, he may express an opinion with reference to it, although not set out in the form of a hypothetical question. The question objected to contained that part of the evidence not within the personal knowledge of the witness. It was not necessary to itemize the facts within his personal observation and which he testified to as a witness. They were included in that part of the question reading: "Taken in connection with what you found, the objective symptoms." This is no infringement upon the rule that when a physician has not made a personal examination of the patient, and has not heard other witnesses testify with reference to the facts, then the hypothetical question must be based upon a statement of all the evidence which was produced at the trial. Wigmore on Evidence, ‡‡ 672-678.

2. Upon the former trial the jury returned a verdict for $12,500. The trial court cut it down to $9,000, and upon appeal in this court a new trial was ordered on the ground that the veridct was excessive. At the second trial the jury returned a verdict for $15,000, and the trial court ordered a new trial unless respondent was willing to accept a reduction to $10,000. At the former trial the evidence was conflicting in respect to the nature of the injuries, and the judge who passed upon the evidence and ordered the verdict reduced was not the judge who tried the case. The evidence at the present trial regarding the nature and extent of the injuries differs considerably. Some of the witnesses who testified at the former trial did not testify at the second, and others who did not testify at the first trial did at the second. The trial judge had the benefit of seeing the witnesses and judging as to their credibility, and the verdict, as reduced, is sustained by the evidence.

Affirmed.

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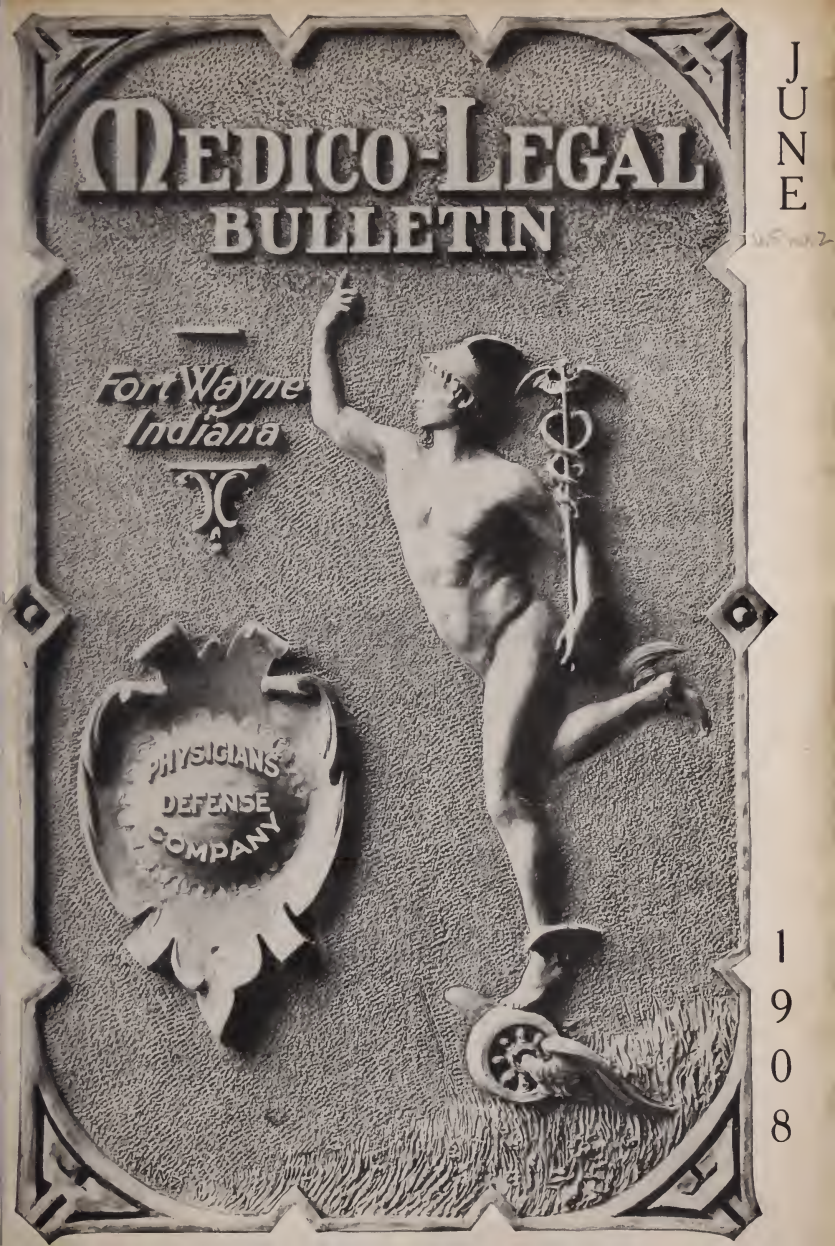
MEDICO-LEGAL BULLETIN

Fort Wayne
Indiana



JUNE

1908

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

VOL. 5 JUNE 1908 NO. 2

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

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s'But Dr. Fiset, not moche fonne he get,
Drivin' all over de whole contree.
If de road she's bad, if de road she's good,
When ev'ryt'ing's drown on de Spring-tam flood
An' workin' for not'ing half tam' mebbe!''

And then sued for malpractice in the bargain.

Let Us Protect You

THE PHYSICIANS DEFENSE CO.,

Fort Wayne, Ind.

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I do not own or maintain a hospital or sanitarium, except as follows:

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Date.....190.... Applicant's Signature.....

MEDICO-LEGAL BULLETIN

VOL. 5 JUNE, 1908 NO. 2

"TO BE, OR NOT TO BE, THAT IS THE QUESTION; WHETHER IT IS BETTER TO SUFFER THE ILLS WE HAVE OR FLY TO THOSE WE KNOW NOT OF."

Notwithstanding that each of the hundreds of communications received by the Physicians Defense Company from the members of the profession everywhere raising a storm of indignation and protest against the actions and methods of a new Protective Company of Fort Wayne, Indiana, has been carefully and fully answered by letter, The Physicians Defense Company feels that it owes it to the profession, which it has so successfully protected for nine years, and which has so generously supported it, and extensively patronized it, to set forth, in this issue of the Medico-Legal Bulletin, a full and comprehensive outline of the matter and our action in the premises; and therefore we respectfully call your attention to the following which is a synopsis of a complaint filed in a suit commenced in the Allen County Indiana Superior Court against the Medical Protective Company; and we earnestly invite the profession to give the same careful consideration, to the end that they may come to a realization of the conditions as they actually are, and understand the relation of the two companies to the profession, and to clear up the uncertainty, misconception, and confusion that has resulted from the acts of the defendant in this suit, and to firmly establish the fact in your minds that the old company, the original pioneer, the big company, the Physicians Defense Company of Fort Wayne Indiana has not changed in any respect, that the same honorable good men, members of the profession and laymen, are at the helm.

The Physicians Defense Company is today greater, stronger, has a larger surplus, owns its own home building, valued at in the neighborhood of one hundred thousand dollars, and is better equipped by years of experience and faithful application to business to do its great work for the profession than at any time in the history of its successful career. We therefore respectfully ask you to read and reflect upon the following synopsis, for we feel confident that your conclusion and verdict will be what we anticipate the jury in the matter to find.

STATE OF INDIANA)
ALLEN COUNTY) ss.

In the Allen Superior Court, Term 1908.

THE PHYSICIANS DEFENSE COMPANY,
Plaintiff.

vs.

THE MEDICAL PROTECTIVE COMPANY.
CHARLES M. NIEZER, and
BYRON H. SOMERS

BILL OF COMPLAINT

STEUART AND STEUART, New York,
ROBERT S. TAYLOR, Fort Wayne,
Attorneys for Plaintiff.

The complaint charges that Messrs. Somers and Niezer, having resigned their positions with the Physicians Defense Company, openly set about to organize the company which they had been "secretly and surreptitiously" promoting while still in the trusted employ of the plaintiff

company. "They took with them," further charges the complaint "much of the private information, data, contract holders subscription lists, digests of cases and the like, of the Physicians Defense Company, together with a number of this company's agency force and clerical force which they attempted and partially succeeded in disrupting and appropriating to themselves. The defendants," so further says the complaint, "by providing the defendant corporation with the same business location as the plaintiff's, a virtual replica of its name, two of its previously trusted officials, a portion of its trained agency and clerical force and much of its private information, data, lists, etc., by copying, in many instances slavishly, its ideas, methods, contracts, applications, literature, pamphlets, circulars and advertisements, by the use and employment of these and of misleading and false statements and representations and other deceptive and underhanded means and methods, have been engaged at the cost and expense of the plaintiff Physicians Defense Company, ever since the date of the organizatian of the defendant corporation on the 30th day of December, 1907, as aforesaid, and now are engaged in a most flagrant species of unfair and fraudulent trade and competition, whereby they were and are now enabled to, and actually did and do, confuse, deceive and mislead the public, the medical profession and the plaintiff's patrons into the belief that the defendant corporation and its contract is the same as the Physicians Defense Company and its contract, palm off and substitute the one for the other and sell the contract of the defendant corportaion as and for the contract of the Physicians Defense Company, appropriating and diverting to themselves the fees, profits and emoluments which are intended and in justice should go to and of right belong to the Physicians Defense Company, all to the great and lasting injury and damage to the business and good will of the Physicians Defense Company and its good name and reputation. Therefore this suit is brought against the defendants above named and each of them to enjoin and restrain them from continuing their unlawful, unjust and wrongful acts and the piracy of the business and good will of the Physicians Defense Company and for an accounting and recovery of the damages thereby sustained and inflicted."

The complaint then explains the nature of the company's services to the medical profession.

These facts show the value of the company's services and indicate the injury that was done when former trusted employes used the knowledge and property of the company to enter into a competition which, under the charges of the complaint, is unfair and in some of the defendants' practices fraudulent. The plaintiff holds that the organization of a competing company which bodily adopted its purposes, objects, plans, methods, principles, services, contracts, applications, renewals, charges, literature, pamphlets and advertising matter, was an unfair act contrary to the law.

By virtue of its success it has built up an extensive and valuable good will which is the life of its business. It is, the complaint avers, equitably entitled to reap the reward of its expenditures, industry and faithful services and to be protected against unfair competitors and unscrupulous rivals, "who by unfair and fraudulent means seek to trade on its reputation, pirate its good will and divert the rewards of its business and labors."

The complaint next turns to the co-defendants, Somers and Niezer, saying: "The defendants, Niezer and Somers,

had for many years prior to about December 20, 1907, been connected with and employed by the Physicians Defense Company in positions of trust and as officials the former as counsel in the legal department and the latter as assistant secretary. These men had been carefully trained in the business of that company and all the knowledge they possess of a business of like character was acquired in that company and at its cost. They possessed full knowledge of the business and affairs of that company, even of the most private character, and enjoyed unrestricted access to the records, archives, data, information and other property of the company. They were in close touch with the company's agency and clerical force. Much of the correspondence of the company was signed for it by them in their names. Under these circumstances, while they were still occupying their positions of trust, enjoying the confidence reposed in them, utilizing the privileges accorded them and drawing the salaries paid them by the Physicians Defense Company for fidelity to its interests, these defendants, Neizer and Somers, with rare perfidy and betrayal of trust and in utter disregard of the fundamental principles of honesty and morality which govern the actions of honorable men, entered into a secret conspiracy against the welfare and interests of the company they were being paid to conserve and protect, and surreptitiously laid and so far as they could, perfected plans for a rival organization built upon a scheme of fraud and deception to unfairly and fraudulently compete with the Physicians Defense Company. At the same time these defendants were engaged in efforts, which to a considerable degree were successful, to disrupt and corrupt the agency force of the company and entice them to join forces with the proposed rival. With astonishing duplicity, these defendants, with one face clandestinely made overtures to and arrangements with these agents and clerks to desert the Physicians Defense Company for the projected competitor, while at the same time, with their other face, they would outwardly and ostensibly be loyally engaged in conducting the business of the Physicians Defense Company with these same seduced agents and clerks.

"On or about December 20, 1907, these defendants, Niezer and Somers, having been discovered in their operations, resigned their positions with the Physicians Defense Company, and thereafter devoted themselves to the affairs of the new company, openly now instead of secretly and surreptitiously as theretofore.

"They took with them to and for the new company the knowledge of the business and affairs of the Physicians Defense Company, which they had received and in which they had been trained at the expense of that company. They took with them a number of the agents and clerks of the company who likewise had been versed and trained in its business and affairs at its cost, the former being particularly useful because of their personal acquaintance with the company's patrons. They took with them a copy or duplicate of the very valuable digest of cases and decisions which as previously stated had been specially prepared by the company for its own use and at a large expenditure in time, labor, skill and money. They took with them complete lists of the company's contract holders with their names and addresses and the date of expiration of each contract. And they took with them also pamphlets, literature and advertising matter of the company, copies of its contracts, applications and receipts, and such other books, property, private records, data and in-

formation of the company as might be useful for their purposes."

The complaint then proceeds thus:

"Verily was this new company conceived in sin and brought forth in iniquity; fraud stood sponsor at the birth of this illegitimate infant and has since continued to guide and direct its tottering footsteps."

The complaint avers also that such a company should not have been organized in Fort Wayne which was long known as the seat of the Physicians Defense Company. This too was calculated to deceive the public and injure the plaintiff company. Even the name Medical Protective Company, was, according to the complaint, selected with a view to purloining some of the reputation of the plaintiff company by adopting a name of the same number of words, with one word the same, and others conveying the same idea. The complaint charges that the Medical Protective Company has at times in its advertising called itself the Physicians Protective Company, seeking still further to deceive the public and injure the plaintiff's business. It is charged that the contract offered by the defendant company is practically a copy of the plaintiff company's contracts even to the printing and color of the paper. The defendant company's contract has, it is admitted, a few provisions not contained in the contract of the plaintiff company, but this the complaint says, "was essential in carrying out its scheme of fraud and deception." in spite of the lack of any real merit in such additional features. The complaint sets out that if the new company's contract is not void or illegal as against public policy, then at least it is a gross fraud on the buyers thereof and it is doubly a gross fraud to represent it as a guaranteed contract and to sell it under such a false pretense; and it is trebly a gross fraud, continues the complaint, "to sell such a contract as and for the contract of the Physicians Defense Company."

FORGERY CHARGED.

The complaint then details the course of the new company in seeking business from the plaintiff's contract holders and shows how the forms and phrases of the plaintiff company were used over the signature of Byron H. Somers who had formerly signed his name to the plaintiff company's letters. It is charged that the doctors taking contracts with the new companies have actually made out the checks to the Physicians Defense Company, plaintiff, but the defendant company had endorsed and collected on these checks and delivered to the doctor who had been deceived contracts with the defendant company. This is one of the most serious charges of the whole complaint as it implicates some one, either the officers of the defendant company or its field agents in forging the signature of the plaintiff company. These wrongful acts, the complaint further alleges "are intended, designed and calculated to operate, have operated, and are now operating, and unless enjoined will continue to operate, to mislead and deceive the public, the medical profession and the patrons and customers of the plaintiff, and others into the belief that the defendant company its business and contracts are or are the same as the plaintiff, its business and contracts, to place and sell the contracts of the defendant company through misleading or false statements or representations, and as and for the contract of the plaintiff, to fraudulently divert and secure to the defendants the profits and emoluments belonging to the plaintiff and its business, and to pirate and trade on the reputation and good will

of the plaintiff. The said acts, all and singular, the continuance of which is threatened, constitute an unfair and unlawful competition in trade, all to the plaintiff's great loss, injury and damage, which will become irreparable if not restrained, and against the continuance of which the plaintiff is equitably entitled to be protected."

To the end that relief may be afforded by the court the plaintiff asks that the defendants, Niezer and Somers, be made defendants and be required to answer each and every allegation; that the defendants be enjoined from using a name or title like that of the plaintiff, from using the name or term Fort Wayne; from using the information obtained while in confidential relations with the plaintiff company as its employes; from using any digests or records; from selling or issuing contracts like those of the plaintiff; and from taking advantage in several other ways set out of forms, etc., invented and designed by the plaintiff company.

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession.

UNDER MISSOURI STATUTE GRADUATE OF MEDICAL SCHOOL MUST SECURE LICENSE BEFORE PRACTICING

STATE vs. MCCLEARY, 109 S. W. REP. 638 (MO.)

JOHNSON, J. On May 19, 1905, defendant was indicted on a charge of practicing medicine and surgery in Cass county, on the 22d day of April, 1905, "without first having obtained from the State Board a certificate authorizing him to so practice," etc. March 17, 1906, on motion filed by defendant, the indictment was quashed, and the prosecuting attorney on the same day filed an information against defendant, in part as follows: "That A. S. McCleary, not being a registered physician, on March 12, 1901, late of the county aforesaid, on the 22d day of April, 1905, at the county of Cass, state aforesaid, did unlawfully practice medicine and surgery, and did then and there treat the sick and afflicted by prescribing for, and treating medicinally and professionally as a physician, one J. B. Hobbs, without first having obtained from the State Board of Health, of the state of Missouri, a license authorizing him, the said A. S. McCleary, to practice medicine and surgery." Afterward, on the 11th day of September, 1906, the following amended information was filed: 'For amended information, on his official oath, D. C. Barnett, prosecuting attorney within and for the county and state aforesaid, informs the court that A. S. McCleary, late of the county aforesaid, on the 22d day of April, A. D., 1905, at the county of Cass, state aforesaid, did unlawfully practice medicine and surgery, and did then and there treat the sick and afflicted by examining, diagnosing, operating upon, prescribing for, and treating medicinally and professionally as a physician, one J. B. Hobbs, without first having obtained, from the State Board of Health of the state of Missouri, a license to so practice medicine and surgery, or so to treat the sick and afflicted, and without any legal authority so to do, he, the said A. S. McCleary, heretofore, at the May term of this court, 1905, and on the 19th day of May, 1905, having been indicted by the grand jury for the state of Missouri, summoned from the body of Cass county, impaneled, charged, and sworn for the same offense as herein charged, which indictment was pending in this court from the last date aforesaid until the same was quashed and set aside by the filing, by said prosecuting attorney on March 17, 1906, of the information in this cause, of which information this is the amended information, and the entering by the said prosecuting attorney of a nolle to said indictment in this court on the 24th day of March, A. D. 1906, on account of said indictment being defective against the peace and dignity of the state." A motion to quash the amended

information filed by defendant was overruled. The cause went to trial, was submitted to the jury, verdict of guilty was returned, and a fine of $50 was assessed against defendant, who, after ineffectually moving for a new trial and in arrest of judgment, brought the case here by appeal.

The fact that defendant gave medical treatment to the person named in the indictment and informations, at the time and place specified, is established conclusively by the evidence of the state, and is not denied by defendant. It is conceded that the services were not gratuitous; that defendant had no license from the State Board of Health to practice medicine and surgery in this state; that he was not a registered physician on March 12, 1901, and was not a commissioned surgeon of the United States army, navy, and marine hospital service. In support of his claim that he had a right to practice medicine, defendant offered to prove that in 1900, he matriculated (i. e., was enrolled as a pupil) in the Eclectic Medical University of Kansas City, Mo., pursued a four-year course of study therein, graduated and received a diploma therefrom in 1904; that he presented to the Board of Health competent evidence of these facts, together with proof of his good moral character, tendered payment of the license fee of $15, and requested that a license be issued to him, but that the board arbitrarily, and without good cause, refused to grant the license. The refusal of the trial court to admit this evidence is one of the grounds urged for a reversal of the judgment. Defendant argues that the facts he offered to prove entitled him to practice his profession without a license, while the state contends that they go no further than to prove his eligibility to receive a license, but that, without a license regularly issued to him by the State Board of Health, he had no lawful right to practice in this state. It appears that, after the license was refused him, defendant filed a petition in the Supreme Court for a writ of mandamus against the board to compel it to issue him a license. An alternative writ was granted, and on final hearing a peremtory writ was issued. State ex rel. McCleary v. Adcock et al., 206 Mo. 550, 105 S. W. 270. In the opinion filed the Supreme Court held that the board had acted arbitrarily, that its duties with respect to the granting of such license were ministerial, not judicial, and that the relator (defendant here) was entitled to the extraordinary remedy invoked. But the question now before us was not decided, and we must go to the statutes to ascertain whether defendan , being qualified to receive a license and being wrongfully deprived of it, could practice lawfully without it. Pertinent provisions of the statutory law are to be found in "An act to regulate the practice of medicine," etc., approved March 12, 1901 (Laws 1901, pp. 207-209; Ann. St. 1906, ‡‡ 8518-1, 8518-5, 8518-9), from which we quote the following sections:

"1. It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or to engage in the practice of midwifery in the state of Missouri, except as hereinafter provided."

"5. Any person, except physicians now registered, practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities wi hout first obtaining a license from the State Board of Health, as provided in this act, shall be deemed guilty of a misdeamenor and

punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year." etc.

"9. It is not intended by this act to prohibit gratuitous service to and treatmen of the afflicted, and this act shall not apply to commissioned surgeons of the United States army, navy and marine hospital service."

In 1903 (Sess. Acts, p. 240; Ann. St. 1906, ‡ 8518-9), the Legislature amended the section last quoted to read as follows: "It is not intended by this act to probihit gratuitous service to and treatment of afflicted, and this act shall not apply to commissioned surgeons of the United States army, navy and marine hospital service nor to any student who has matriculated in a medical college on or prior to March 12, 1901, and it shall be the duty of said board of health on receiving a fee of fifteen dollars from said student to issue to him a license to practice medicine when said student presents a diploma from any medical college of this state." The Supreme Court in State v. Davis, 194 Mo. 485, 92 S. W. 484, 4 L. R. A. (N. S.) 1023, sustained the validity of the provisions of the act under consideration, on the ground that, as a part of its police power, the state has the right to determine upon what conditions and under what circumstances its citizens shall be entitled to pursue any vocation, and declared that, in order for a physician to practice his profession in this state, he must comply with the conditions imposed upon him by the law in force at the time he undertakes to engage in such practice. Section 5 unequivocally prohibits any person, except physicians registered at the time of the approval of the act from practicing medicine or surgery without first obtaining a license from the State Board of Health. Section 9 excepts another class of persons from the operation of section 5. Therefore the act of 1901, when considered as a whole, required all persons who desire to practice in this state to obtain a license, except registered physicians and commissioned surgeons of the United States army, navy, and marine hospital service, and provided a penalty for the violation of its provisions. Section 3 required all persons who applied for a license to appear before the board of health and "be examined as to their fitness to engage in such practice," and did not except from such examination applicants who had matriculated in a medcial college prior to March 12, 1901, and afterwards received a diploma therefrom. It is clear that, in the amendment of section 9, the Legislature expressed no intention of placing a graduate from a medical college who had matriculated prior to March 12, 1901, among the classes of persons exempt from the requirement of obtaining a license as a condition precedent to the practice of their profession, but did intend to provide that such graduate, by complying with the conditions imposed, should be entitled to a license without being subjected to the ordeal of undergoing the examination required in section 3. If the Legislature intended to exempt a "student who has matriculated in a medical college on or prior to March 12, 1901," from the necessity of obtaining a license, why did it make it the duty of the board to issue him a license "on receiving a fee of fifteen dollars from said student when said student presents a diploma from any medical college of this state?" Manifestly, defendant, as such student, was not placed by the amendment in the same class with registered physicians and army surgeons, and could not practice his pro-

fession legally without first obtaining a license.

The fact that he proved himself to be qualified to receive a license and the board improperly refused to issue it, did not excuse defendant from liability to answer for his violation of the law. The precise point was dceided adversely to his contention by the Supreme Court in State v. Doerring, 194 Mo. 415, 92 S. W. 489, where it is said: "The offense with which defendant is charged is practicing dentistry without having a license so to do, as provided by the statute, and it is admitted in the agreed statement of facts that he practiced his profession and had no such license; hence the contention of appellant that he had fully complied with the provisions of the law, and that the board improperly refused to issue the license, cannot avail him anything in this proceeding. If he had substantially complied with all the provisions of the statute, and the board wrongfully withheld from him a license, then he must resort to some appropriate remedy to compel the i suance of such license. If he practiced his profession without having the authority so to do, as provided by the statute, the offense was complete, and it can make no difference, so far as this proceeding is concerned, whether the board acted justly or unjustly, with him, in the matter of refusing to issue the license." It follows that the trial court committed no error in refusing to receive the evidence under consideration, nor do we find error in the instructions given. The only issue of fact to go to the jury was whether the defendant practiced, as a physician for hire, on the person and at the time and place charged in the information, and this issue was properly submitted.

Points made by defendant against the sufficiency of the information have been examined, and found to be without merit.

The judgment is affiremd. All concur.

A CORPORATION ADVERTISING TO PRACTICE MEDICINE IS GUILTY OF VIOLATION OF THE STATUTE AGAINST PRACTICING WITHOUT A LICENSE.

PEOPLE v. WOODBURY DERMATOLOGICAL INSITTUTE 109 N. Y. SUPP. 578.

LAUGHLIN, J. The defendant is a domestic corporation. It was duly incorporated on or about the 31st day of March, 1890, under and pursuant to the provisions of an act of the Legislature passed on the 17th day of February, 1848 (Laws 1848, p. 54, c. 40), entitled "An act to authorize the fo mation of corporations for manufacturing, mining, mechanical or chemical purposes," and acts amendatory thereof and supplemental thereto. The evidence satisfactorily shows that the defendant advertised that it was practicing medicine, as set forth in the information upon which it was tried.

Section 15, c. 344, p. 646, Laws 1907, which became of force prior to the time the defendant advertised the practice of medicine, as set forth in he information, provides, among other things, as follows:

"Any person, not a registered physician, who shall advertise to practice medicine, shall be guilty of a misdemeanor."

The conviction was for a violation of this provision of the statute. The learned counsel for the appellant contends that the statute does not prohibit the practice of medicine by a corporation. The learned counsel for the people draws attention to section 5 of the statutory construction law (Laws 1892, p. 1487, c. 677), which provides that "the term 'person' includes a corporation and a joint-stock company," and insists that

this is the rule of construction to be applied to the statute in question. Section 1 of the statutory construction law provides as follows:

"This chapter * * * is applicable to every statute unless its general object, or the context of the language construed, or other provision of law indicates that a different meaning or application is intended than that required to be given by this chapter."

I am of opinion that this statutory construction law is applicable, and governs the construction of the statute in question. The purpose and object of the statute was to limit the practice of medicine and advertising to practice medicine to those lawfully registered or otherwise authorized to practice medicine. Strictly speaking, of course, a corporation can neither qualify to practice medicine nor administer medical or surgical aid. If the Legislature enacted the prohibition against practicing medicine and advertising to practice medicine upon the theory that a corporation could not practice medicine, then there would be no reason for inferring that it intended to prohibit something which could not be done, for that would be quite unnecessary. As I view it, the only theory upon which this prohibition can be deemed to extend to corporations is that the Legislature recognized that, while corporations may not obtain diplomas and register as physicians or actually treat patients or perform surgical operations, they may, through agents and employes, as all corporations are obliged to perform their functions, practice medicine by providing accommodations for patients and facilities for their care and treatment, and physicians and surgeons to administer to them. This is and for many years has been done in hospitals, dispensaries, infirmaries, and sanitariums with which the Legislature is presumed to have been familiar. Were the corporation authorized to receive, and by the aid of physicians and surgeons to treat, patients, and by the aid of nurses and other employes to properly care for them, I am of opinion that they come within the exception contained in section 1 of the statutory construction law, and are neither prohbited from practicng medicine in that sense nor from advertising such practice. Although, therefore, in a technical sense, a corporation cannot practice medicine, yet, if it be authorized to provide suitable accommodations for the care and treatment of the sick and to receive patients, and to employ physicians and surgeons to treat them, this law should not be construed as prohibiting it from advertising that which it is thus authorized to do. This being so, I see no public good or advancement in the cause of relieving the community from the imposition of quackery that will flow from a judicial decision that a corporation thus authorized to receive and provide for the medical or surgical treatment of patients may not advertise that it prescribes medicines or performs surgical operations, for the reason that it is not and cannot be registered as a physician or surgeon, and it is physically impossible for it to so prescribe or perform operations because of its inanimate nature, but that it may lawfully advertise just what it in fact does, and that is that it receives patients and employs physicians and surgeons to treat them; for everybody knows that that is the only way it could treat them. If such an institution employed others than duly registered physicians and surgeons to treat those coming to it for medical or surgical aid, then, if it advertised that it was practicing medicine, it might be guilty of a violation of this statute, even though it be authorized to thus practice medicine, employing duly

registered physicians and surgeons; and, of course, the individuals prescribing for the patients in treating them surgically would be subject to prosecution if not duly registered. Chapter 95, p. 93, Laws 1889, which authorized the incorporation of "hospitals, infirmaries, dispensaries and homes for indigent persons," provided in section 5 that the certificate of incorporation might declare and prescribe the qualification of members "in the matter of adherence or nonadherence to any particular school or theory of medical or surgical treatment, and what system of practice or medicine or treatment shall be used and applied in such hospital, infirmary or home," and section 4 thereof, so far as material, provided that the property of the corporation should be exempt from taxation "to the extent that, and so long as, the same shall be used exclusively for the care, reception, maintenance, medical and surgical advice, aid and treatment, * * * and provided that it shall and do actually render medical and surgical aid, advice and treatment to poor persons in need of such treatment without charge therefor." Section 8 provided, among other things, that:

"The by-laws may specify what classes and description of persons shall or may receive treatment, advice, care and maintenance from said hospital, infirmary, dispensary or home."

These statutory provisions have been superseded by the provisions of article 6 of the membership corporation law (Laws 1895, p. 354, c. 559), in which they are substantially re-enacted. It will be seen that by the provisions quoted from sections 4 and 8 of the act of 1889 it was expressly contemplated that the patients should be treated by the institution, which of course, is the practical effect in such cases. The hospitals or other institutions owe a duty with respect to the care and medical treatment, even of free patients; and we may take judicial notice of the fact that they receive some patients for hire and incur a responsibility to exercise proper care in the selection of physicians, surgeons, nurses, and other attendants, as is shown by the cases which have come before the court for adjudication. I am of opinion, therefore as already observed that these institutions which are authorized to receive patients for treatment and to provide medical and surgical treatment for them do not come within the prohibition of the act, and that they may lawfully advertise the business which they are thus duly authorized to do. It may be that sanitariums and similar institutions, although incorporated under the business law, are authorized to receive patients and employ physicians and surgeons to treat them; but that question is not presented for decision, and upon it I express no opinion. I limit my opinion to the proposition that any corporation lawfully authorized to receive and care for individuals requiring medical or surgical treatment and to provide proper treatment for them either gratuitously or for hire may advertise its business without subjecting itself to liability for a violation of the statute in question, and that it is quite immaterial whether it advertises that it prescribes for and treats the patients, or that this is done by its employes. The defendant, however, has not shown that it was duly authorized to receive patients or furnish them medical or surgical aid or treatment. Its certificate of incorporation limits its business to "manufacturing chemical preparations and printing, publishing and selling books and pamphlets relating to the same and advertising the same." It therefore does not come within the exception contained in section 1 of the statutory construction law, and the statute prohibits it from

advertising the practice of medicine.

It follows that the judgment should be affirmed.

Patterson, P. J., concurs.

Ingraham, J. The district attorney presented to the court of Special Sessions an information charging that the defendant, a domestic corporation not lawfully authorized to practice medicine within the state and so registered according to law, did cause and procure to be printed and published in certain newspapers in the city of New York an advertisement that it was practicing medicine within the said city. Upon the trial before the Court of Special Sessions the defendant was convicted and fined, and from that judgment the defendant appeals.

The defendant was incorporated under an act (chapter 40, p. 54, Laws 1848) which provides for the formation of corporations for mining, manufacturing, and chemical purposes and the several acts of the Legislature amendatory thereto. The object for which the said defendant was incorporated was "the carrying on of the business of manufacturing chemical preparations and printing, publishing and selling books and pamphlets relating to the same and advertising the same." The capital stock of the company was $1,000, and this certificate was filed March 23, 1890. Subsequently the defendant inserted in various newspapers advertisements offering ot give medical treatment for certain defects or deficiencies and also published certain books and pamphlets with the same object. The only question presented on this appeal is whether a corporation can be guilty of a crime under section 15 of the medical law (chapter 344, p. 646, Laws 1907). By the statutory construction law (chapter 677, p. 1486, Laws 1892), which by section 1 is applicable to every statute, unless its general object or the context of the language construed or other provision of law indicate that a different meaning or application was intended from that required to be given by the chapter, provides in section 5 that "the term person includes a corporation and a joint-stock association." This provision in the statutory construction law was taken from subdivision 13 of section 718 of the Penal Code, and from section 955 of the Code of Criminal Procedure, there applicable to the commission of crimes and to the procedure in criminal prosecutions, and which sections of the Penal Code and Code of Crimnal Procedure were repealed by section 35 of the statutory construction law as being covered by section 5 of that act. The effect of the enactment of this provision in the statutory construction law with the simultaneous repeal of these sections in the Penal Code and Code of Criminal Procedure would seem to clearly indicate that it was the intention of the Legislature to make this provision apply to all cases in which a corporation had committed an act which by-law was made a criminal offense if committed by a "person." After the enactment of the statutory construction law, the laws relating to the practice of medicine were revised by the enactment of the medical law (chapter 344, p. 636, Laws 1907). By subdivision 7 of section 1 of that act the practice of medicine is defined as follows;

"A person practices medicine within the meaning of this act, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity of physical condition, and who shall either offer or undertake by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physica condition."

And section 2 provides that no person shall practice medicine unless registered and legally authorized prior to September 1, 1891, or unless licensed by the regents and registered under the provisions of certain acts specified, or unless licensed by the regents and registered as required by the act. The statute then provides for the appointment of a state board of medical examiners, for the examination of candidates for admission to practice, for the issuing of licenses to the successful applicants, and for the revocation of a license for certain specified offenses; and then by section 15 provides that:

"Any person who, not being then lawfully authorized to practice medicine within this state and so registered according to law, shall practice medicine within this state without lawful registration or in violation of any provision of this article; * * * or any person not a registered physician who shall advertise to practice medicine, shall be guilty of a misdemeanor."

The whole object of this act is clearly to restrict the practice of medicine to those therein authorized. Section 2 expressly provides that no person shall practice medicine unless registered or licensed as therein provided. It could not have been the intention of the Legislature to restrict an individual from practicing medicine unless he had complied with the very careful provisions of the act for testing his competency to so practice, and yet allow a corporation, through its agents, to practice without any examination or license whatever. Such a construction would be against the avowed and clearly expressed intention of the Legislature. It is also manifest that it was the intention to prohibit any one not legally authorized to practice medicine from advertising to practice. Under this act a corporation never could become legally authorized to practice medicine, and, reading into the act the definition contained in the statutory construction law, the statute would then provide:

"Any person, including a corporation and a joint-stock association, who, not being then legally authorized to practice medicine within this state and so registered according to law, shall practice medicine within this state without lawful registration or in violation of any provision of this actirle; * * * or any person, including a corporation and a joint-stock association not a registered physician who shall advertise to practice medicine, shall be guilty of a misdemeanor."

The defendant, a corporation, having advertised to practice medicine, was therefore acting in violation of this provision, and was properly convicted.

We are referred to several English cases which are claimed to be contrary to this construction of the statute, but it is quite unnecessary to refer to them more than to say that they arose under statutes which are essentially different from the one now under consideration, and present an entirely different question, and this view would seem to be incidentally approved by the Court of appeals in Hannon v. Siegel-Cooper Company, 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429. But it seems to me the question is entirely clear. A consideration of the medical law, the clearly avowed object of which was to prevent incompetent and irresponsible persons from practicing medicine, as well as the clearly expressed intention of the Legislature by the statutory construction law substituting in place of various provisions defining and creating crimes as well as civil rights and remedies the definition of "person" and substituting this definition for the definitions theretofore

contained in the Penal Code and the Code of Criminal Procedure, seems to me to clearly demonstrate that the provisions of the meidcal law were intended to apply to all persons natural or artificial and to prohibit any person, whether a natural individual or a corporation or joint-stock association, from practicing or advertising to practice medicine unless expressly authorized by the act.

This conclusion necessarily results in the affirmance of the judgment appealed from; and it is therefore affirmed.

Clarke, J., concurs.

Houghton, J. (dissenting). The purpose of that part of the public health law relating to the practice of medicine is to regulate the qualifications of a physician and prescribe what attainments he shall possess before being permitted to practice. Manifestly the necessary attainments are such as only a natural person can acquire. No corporation can ever qualify itself to practice medicine, and hence I do not think the Legislature intended to include a corporation in any of the provisions of the law. There could have been no intent to prohibit a corporation from advertising to do what every one would know if could not do, and which could be no fraud, because no one could be deceived. The Legislature well knew that certain corporations throughout the state were engaged in the business of conducting sanitariums and hospitals quite necessary and beneficial to the community. If the construction contended for by the people is correct, each one of these violates the statute by advertising that it conducted an establishment for the treatment of diseases, and maintained a corps of physicians of the highest standing to treat its patients. Very probably the defendant is not engaged in such a legitimate business and that it is exceeding its corporate powers, but that does not make it guilty of the charge upon which it has been convicted. If it employed any unlicensed physicians and received the fruits of their services, quite another question would be presented, and possibly in such case it might be convicted of some crime, and, of course, the individuals so practicing would be guilty. So far as appears, however, no unlicensed physicians are employed.

It seems to me the defendant corporation does not come within the statute, and that its conviction was improper.

LIABILITY OF SURGEON FOR INJURY TO PATIENT OCCURRING AFTER OPERATION

Haase v. Morton & Morton 115 N. W. Rep. 920 April, 1908. (Ia.)

Appeal from District Court, Hardin County; J. H. Richard, Judge.

Suit to recover damages for a personal injury. There was a verdict and judgment for the plaintiff. The defendants appeal. Affirmed.

F. N. Williams, Albrook & Lundy, and Nagle & Nagle, for appellants. Sager & Sweet and J. H. Scales for appellee.

Sherwin, J. The defendants, Wm. M. Morton and L. B. Morton, are physicians practicing their profession under the firm name of Morton & Morton in Iowa Falls and vicinity. Early in January, 1905, Dr. W. M. Morton, the senior member of the firm, was called to the plaintiff's home in Iowa Falls for the purpose of treating the plaintiff professionally. He made a thorough examination of her condition and determined that a surgical operation was necessary. He also suggested that it would be safer and more convenient to perform the operation at the hospital located near the plaintiff's home, and undertook to and did make the necessary arrangements for performing it there. Soon thereafter the plaintiff was taken to

the hospital by Dr. W. M. Morton. She was given a room where she dressed for the operating table, and was then taken to the operating room in the story above by one of the attendants who was fitting herself for a nurse. The plaintiff was then laid on the operating table and the defendant Dr. L. B. Morton administered the anaesthetic, and the defendant, Dr. Wm. M. Morton performed the operation. After the operation, the plaintiff was taken from the operating table and placed on a car or stretcher for the purpose of taking her to her room on the floor below. Both of the defendants assisted in placing her on the car. The car was about six feet long and had six rubber-tired wheels, to large wheels in the center, and two smaller ones on each end. When either set of end wheels was resting on the floor, the car inclined in that direction. After the plaintiff had been placed on a car or stretcher, Dr. Wm. M. Morton left the operating room for the surgeon's dressing room, and Dr. L. B. Morton and Miss Klein, the nurse who had shown the plaintiff to the operating room, rolled the car into the elevator room for the purpose of taking it to the room below on the elevator, the doctor being in front of the car and the nurse behind it. When they reached the elevator room, they found the elevator door wide open and the elevator below. The elevator room was only six or seven feet square, and the car on which the plaintiff rested was stopped with the front end thereof resting on the wheels and only a foot from the elevator door. After the car had been stopped, Dr. L. B. Morton left it and stepped to the side of the elevator shaft for the purpose of bringing the elevator to their floor. The machinery did not at once respond to his efforts, whereupon Miss Klein, the nurse, told the defendant that she would go and call the janitor. She then left the car, and after she had gotten some seven or eight feet therefrom, the defendant said to her "never mind, I can get it from here." When Miss Klein turned to go back into the elevator room, the car was just rolling into the elevator shaft. She reached it but too late to save the plaintiff, who was still unconscious, and they were both precipitated to the floor beolw, some 15 feet. For injuries received in the fall, the plaintiff brings this suit.

At the close of the evidence the defendants moved for a directed verdict, and the motion was overurled. It is now urged that the evidence is not sufficient to support a verdict against either of the defendants and that the court erred in denying the motion. It is said that the accident which could not reasonably have been expected is not negligence. The evidence tends to show, however, that the defendant L. B. Morton had, before this particular time, assisted in operations at the same hospital, and had also assisted in removing the patients operated upon from the operating room by means of the same cart and elevator. It must therefore be presumed that he was familiar with the size and construction of the cart used in the present instance and with the conditions surrounding the elevator and elevator room. It is shown that the peculiar construction of the cart, the end wheels being lower than the center ones, made it very easy to start. The floor in the elevator was cement, and the wheels of the cart were equipped with rubber tires, making a combination well calculated to overcome friction. The elevator door was wide open when the cart was stopped by the defendant, L. B. Morton with its front end within a foot of the elevator shaft. The plaintiff was at the time unconscious, and hence wholy unable to look out for herself or appreciate

the danger of he position. Notwithstanding these dangerous conditions, the defendant not only left the cart himself, but, after being advised by Miss Klein that she had also left it, he paid no attention to it, and a slight movement of the plaintiff started it toward the open shaft. The appellant's position on this branch of the case is unsound for two reasons. In the first place, it may well be sa d that just such a result m ght reasonably be expected to follow the leaving of such a vehicle in so dangerous a place. Indeed, it seems to us that an accident might almost be expected to follow as a matter of course. The cart was easily started, and even unconscious persons not infrequently use their physical power; therefore a reasonably careful person would guard against these conditions singly or combined. In the second place, negligence does not depend upon the questions whether the result of an act might easonably have been foreseen.

The consequence of negligence need not be foreseen. It is enough to constitute negligence if the result of the act is the natural, though not the necessary or inevitable, thing to be expected. If ordinary prudence would suggest that the act or omission would probably result in injury, it is sufficient to support the charge of negligence. Burk v. Creamery Pkg. Co., 126 Iowa, 730, 102 N. W. 793, 108 Am. St. Rep. 377; Osborne v. Van Dyke, 113 Iowa, 557, 85 N. W. 784, 54 54 LR. A. 367; Watters v. Waterloo, 126 Iowa, 199, 101 N. W. 871; Fishburn v. Ry. Co., 127 Iowa, 483, 103 N. W. 481. It is conceded that the defendants were not responsible for the negligence of Miss Klein, and the appellants contend that the act of Dr. L. B. Morton in leaving the cart for the purpose of raising the elevator was not the proximate cause of the accident. Dr. Morton was one of the persons in charge of the plaintiff at the time in question. He had undertaken to assist in removing her to her room, if he was not in fact in charge of her at that particular time, and he was therefore legally bound to exercise reasonable care in her removal. Whether he exercised such care after he knew that Miss Klein had left the cart was clearly a question of fact for the jury. If it be said they were both negligent, it does not relieve the defendant, for it is the rule that the mere fact that some other cause operated with the negligence charged does not relieve from liability. Rice v. Whitley, 115 Iowa, 750, 87 N. W. 694; Schmee v. City of Dubuque, 122 Iowa, 459, 98 N. W. 298; Van Camp v. Keokuk, 130 Iowa, 716, 107 N. W. 933.

2. The appellant Wm. M. Morton, denies liability on the ground that whatever liability exists must rest on the act of his partner, L. B. Morton while he was assisting in the removal of the plaintiff from the operating room to her own room, and insists that the removal to her private room was not within the scope of the ordinary business of the firm. We are unable to agree with this contention, however, The defendants were partners in the general practice, and the partnership acting through Dr. Wm. Morton who advised plaintiff to go to the hospital where she could be much better taken care of than at her home. He made all the arrangements at the hospital for the plaintiff, and took her there in his own carriage. When she arrived there she was shown to a private room, and, acting under the direction of the defendants, she there prepared herself for the operating table. She went from there to the operating room where the anaesthetic was administered by Dr. Lewis Morton and in the presence of Dr. Wm. Morton and several persons connected with the hos-

pital. After the operation was performed and while she was still unconscious, she was removed from the operating table to the cart by Dr. Lewis Morton and one or more of the hospital attendants, and the doctor and Miss Klein undertook to convey her from the operating room to her room on the floor below by means of the elevator. While the evidence tends to show that Miss Klein had been at the hospital about 10 months when the accident occurred and that she had assisted in the kind of work which was being performed when plaintiff was injured, many times, the record also shows that she had never theretofore been up or down the elevator with a patient without the attendance of a physician. It also appeared that if the janitor of the building was present he operated the elevator, but, if he were not there, the doctor operated it just as defendant Lewis Morton attempted to do when plaintiff was injured. It is very clear that plaintiff could not be left in the operating room during the period necessary for her recovery, and it was the duty of some one to see that she was safely removed therefrom and placed in a room suitable for such further treatment as her case might require. While it is shown that neither of the defendants owned or controlled the hospital, it does appear that they made all arrangements for plaintiff's stay there and a jury would be justified in finding that defendants as part of their employment undertook to care for plaintiff from the time she entered the hospital until she was ready for discharge therefrom. And while this might not ordinarily include the work of the hospital employes, the doctors might assume the duty of returning the patient to his room, and in such event each member of the firm would be the agent of the other in carrying on the work. It is fundamental that each partner is the agent of the firm while engaged in the prosecution of the partnership business and that the firm is liable for the torts of each, if committed within the scope of the agency. 22 Am. & Eng. Ency. Law, 168; Champlin v. Laytin, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382. trial court gave an instruction which embodied correct law on this subject and it was for the jury to say whether Lewis Morton was acting for the firm when the accident occurred. It surely should not be said as matter of law in all cases that after a serious surgical operation and while the patient is still unconscious, the physician may leave the patient on the operating table to find his way to his own room the best he may. Furthermore, the evidence shows that in this hospital the doctors accompanied their patients up and down the elevator.

3. Error is predicated on the court's refusal to submit to the jury special interrogatories, the substance of which required a determination as to whether it was reasonable to expect that plaintiff would be precipitated down the elevator shaft. Under the rule of the cases heretofore cited the questions were improper and were rightly refused. But if proper in other respects, they called for a special finding on the one material question in the case, and were for that reason rightly refused. Home Ins. Co. v. Northwestern P. Co. 32 Iowa 323, 7 Am. Rep. 185; Lewis v. C. M. & St. P. R. Co. 57 Iowa, 127, 10 N. W. 336; White v. Adams, 77 Iowa, 295, 42 N. W. 199.

4. Instructions 2, 3, and 4 asked by the defendants were properly refused because they embodied the same principle we hold unsound in the first division of this opinion.

5. Practically all of the instructions given are complained of, but we find no reversible error therein.

The judgment should be, and it is, affirmed.

Affirmed.

WEAVER, J. (dissenting). I am not able to concur in the foregoing opinion. The net result of the holding there expressed is to greatly increase and enlarge the liability, already sufficiently burdensome, of the medical profession. It may be admitted that the defendants advised plaintiff to go to the hospital and in her behalf arranged with the hospital managers for her reception, but I am unaware of any rule of law by which such acts upon their part rendered them chargeable with the negligence of the hospital managers or their servants. There is no pretense that defendants had any connection with or control over the hospital or the attendants there employed except as practicing physicians who went there to treat their patients. The matter of service, nursing, watch, care and personal attendance and assistance were peculiarly the duties assumed by the hospital, and the physicians were charged with no more responsibility of liability with respect thereto than would have been the case had plaintiff been in her own home and surrounded by her own family and servants. There was nothing in the peculiar offices or duties of their profession requiring defendants or either of them to assume the responsibility of carrying or wheeling the patient between her room and the operating room, though if her condition was such as to require it, it might have been their duty to accompany her to administer proper restoratives, or give advice for her care and treatment en route. The hospital managers recognizing this situation did furnish an attendant who handled the car on which plaintiff was being moved, and it is conceded in argument that for the negligence of that attendant the defendants are not liable. The operation for which defendants had been employed had been performed, and the attendant took charge of the car to remove the patient to her room. One of the defendants, Dr. L. S. Morton, walking ahead of the car, discovered that the elevator platform was down, and addressed his efforts to raising it. While the doctor was thus engaged, his head and shoulders being inside the elevator well, the hospital attendant having charge of the car let go her hold upon it, and it moved forward sufficiently to allow plaintiff to slide therefrom into the well, falling to the platform which was then ascending, though not, as I understand the record, the full distance to the lower floor. It is true the attendant says in explanation of her negligence that seeing the doctor was having some difficulty in raising the elevator platform, she spoke to him saying she would go below and raise it. To this he, having then succeeded in getting the platform in motion, responded, saying it was unnecessary for her to go, and before he had brought the platform to their floor the accident occurred. To charge him with this unfortunate result—and to go still further and charge the partnership of which he was a member—strikes me as a grievous injustice not called for by any rule or principle of law. Suppose, in wheeling the car along the hall, the nurse had carelessly tipped it over, precipitating the plaintiff upon the floor, or had carelessly fallen upon or against the plaintiff, or had of her own motion administered a medicine or restorative in excessive or dangerous quantity, is there any principle upon which defendants could be held liable for injuries thus occasioned? I think it safe to say that this question will be unhesitatingly answered in the negative, and yet it will be very difficult indeed to suggest any tenable ground for

distinguishing between the relatoins and inabilities of the parties in these supposed cases and the case at bar. I freely concede that one who adopts a profession which has to do with matters affecting the health and lives of those whom he serves is properly held to a high degree of responsibility, and is required to exercise care reasonably proportioned to the delicacy and importance of the duties he undertakes to perform. While there are doubtless occasional exceptions, it is a matter of common observation that the medical profession of today is keenly alive to its responsibility. No profession excels it in thoroughness of preparation. The true physician never ceases to be a student, never flags in zeal for more thorough mastery of the mysterious laws of human life and human health. In entering the practice he assumes grave risks. Both law and public sentiment demand of him a skill which adequately reflects the accumulated experience of the profession since the day of hippocrates, and the breath of scientific knowledge which is characteristic of the present age. Though he does all a man can do and gives to a case the best fruits of a life of earnest study and in vestigation,he cannot escape carying criticism, and the sick or injured person who is disappointed by his physician's inability to perform a miracle is easily persuaded to find solace in a malpractice suit, in which a sympathetic jury stimulated by the sight of a wasted or crippled human form is led to put a brand of undeserved reproach on one who merits the entire confidence and respect of the community. Every physician who answers an emergency call, even though it be one of the numerous "charity cases" which daily demand much of his time and attention, takes his professional life and reputation in his hand, and when having vainly exhausted all the resources at his command some person inspired by ignorance or malice or hope of blackmail holds him up with a damage claim, he ordinarily finds it to his advantage to submit to unjust exaction rather than risk the uncertain outcome of such controversies in a court of justice. This court, while not relaxing the rule which insists that men holding themselves out as physicians shall exercise the care and skill befitting the profession, ought not to unduly increase the burdens of that profession or make its practice so onerous and hazardous as to drive therefrom its reputable members; yet I feel warranted in saying that such result cannot be avoided if the legal liability of the physician is to be extended materially beyond the limits which have been recognized and established in our earlier adjudications on this subject.

I dissent, also, from the conclusion that, if Dr. L. B. Morton is chargeable with negligence, his parnter, Dr. W. M. Morton, is equally liable with him. Even if we assume that the former was wheeling the car at the time of the accident, though it is conceded he was not, he was engaged not in the business of the partnership, but was voluntarily doing or assisting in the work of a hospital attendant. His partner was not present, took no part in the service being performed at that time, and should be exonerated from all liability. The judgment appealed from should be reversed.

EMPLOYER SUMMONING PHYSICIAN TO CARE FOR INJURED EMPLOYEE IS NOT LIABLE FOR PHYSICIANS SERVICE

MORTON v. ROUCKE, et al. 61 S. E. 478 (GA.) 1908.

W. E. Norton brought an action against John Rourke & Son, a partnership com-

posed of John Rourke and James A. Rourke, and against James A Rourke individually, to recover $150 for medical and surgical services claimed to have been rendered by the plaintiff for John Rafferty, an employe of the defendants. The petition alleged that the services were rendered "at the special instance and request of said defendants, as a firm, and of the said James A. Rourke individually, for which services the said defendants and the said James A. Rourke individually then and there undertook and became liable to pay. The said services so rendered were necessary, and the charges therefor are reasonable." On the trial the plaintiff testified: "I am a physician and surgeon. I am licensed to practice under the laws of Georgia. * * * I had occasion to visit the foundry place of John Rourke & Son. * * * Mr. Jim Rourke telephoned me * * * to go down and see a man. He asked if that was Dr. Norton. I said, 'Yes.' He said: 'This is Jim Rourke of Jno. Rourke & Son. Come down. I have another man hurt.' I said: 'All right, I will come down right away.' I say it was Mr. Jim Rourke who telephoned to me because he had telephoned to me about a week before. I recognized his voice immediately. * * * I went down to the wharf and met Mr. Rourke and he said to me: 'Capt. Rafferty is injured on this boat, and I will show you where he is.' I went with him, and found Capt. Rafferty was in his bunk and unconscious. I ordered the ambulance * * * and had him sent home. Afterwards I had him removed to the hospital, and treated him for his injuries. * * * Mr. Jim Rourke told me to do the best I could for the injured man, and I told him that I would. It was his boat, I presume, the man was injured on. He took me down there. * * * I never was Mr. Rourke's regular physician. I have done work for the firm. * * * I had rendered professional services before at the instance of Mr. Jim Rourke. My services had been engaged by Mr. Rourke before over the telephone. Mr. Jim Rourke did the telephoning then. At that time I went down to Mr. Rourke's machine shops. * * * * Mr. Rourke asked me where I was going to send Mr. Rafferty. I said I was going to send him home for the present, and watch his condition." The witness further testified as to the nature of Rafferty's injuries, the medical and surgical services rendered, and the reasonableness of the charge made therefor.

John Rafferty, a witness for the plaintiff, testified: "I was employed on the tugboat Maude. I was master and pilot of the boat. I was working for John Rourke & Son. Mr. James Rourke employed me. I sustained an injury. * * * I had my skull fractured. I fell, and had my skull broke. I don't know what caused me to fall. When I fell I was about eight miles from here, on the boat. I was sick and asked a man to relieve me at the wheel, and before he came I fell. * * * After I fell I remember nothing. * * * When I came to, I was at the hospital. I was unconscious about a week. I guess. I didn't employ a physician to attend me. When I came to, Dr. Norton was attending me. * * * Dr. Norton used to come to my house on some occasions for my stepson. He never was there for me. * * * I had never employed Dr. Norton for myself. I went myself to the marine doctor when anything happened to me. I would be treated free by the Marine Hospital service. * * * I didn't pay Dr. Norton anything. He has never presented a bill to me. * * * I didn't employ him or authorize his employment. To have free treatment from the Marine Hospital service, I would have had to go to the Marine

Hospital. They would not treat me free if I were home." James G. Rafferty testified for the plaintiff: "Capt. Rafferty is my father. * * * My father was towing mud on the mud scow (at the time he was injured). * * * I got a message to go down to John Rourke & Sons' place, which I did. I met, when I got down there, Mr. Jim Rourke. He asked me who was the family physician, and I said Dr. Norton. He said, 'You better telephone for him.' I said, 'All right,' and I started to do it and he said to me, 'No; never mind. I will telephone for him myself.' He went off, and I went aboard the boat. I found my father lying in the lower bunk. He was seriously hurt. Dr. Norton came there. We put my father in an ambulance, and I went home with him in the ambulance. * * * If I had gone to the telephone when I started, I would have had to walk a couple of hundred feet, I guess. I am a cripple. I walk with a crutch. * * * He (my father) had worked for him (Mr. Rourke) two or three or four months. My father didn't work for him after he got well." James A. Rourke testified for the defendants: "I am a member of two firms. The machine and foundry business has three members in the firm. The firm name is Rourke & Sons. The members of the firm are my father, my brother John, and myself. The firm of John Rourke & Sons is composed of my father and myself. This firm owns the tugboat Maude and all floating property—lighters, tugboats, and so forth. This is the firm that owned the tugboat Maude at the time of the injury to Capt. Rafferty. I got down there on the morning this accident happened shortly after 7. Some time after I got down there I saw the engineer of the boat, and then it was I heard of the accident to Capt. Rafferty. I sent a boy after his son. I went to see the old man. He was lying in the bunk. * * * When I saw him the boat was lying at the wharf. * * * When he (James Rafferty) came down, I told him the old man was hurt and asked him what he wanted done. * * * He said, 'Better get the family physician.' I asked who it was. 'Dr. Norton,' he said. * * * Young James Rafferty is incorrect in his statement that I told him to go and telephone for a doctor, and finally said no, that I would do it for him. I didn't offer to do that telephoning. I didn't do the telephoning at all. I didn't go to the telephone. * * * Harry Singleton, a white man, who was the engineer of the boat, was standing there at the time of this conversation. He went to have the doctor telephoned for . * * * Dr. Norton is not my family physician. He does not do the work for Rourke & Son. * * * Dr. Owens is my father's physician. I knew that Capt. Rafferty was a licensed captain. All steamboat people get their treatment free. All we had to do would be to send him to the Marine Hospital. * * * You have to sign a printed slip to get a steamboat man in there, that is all. * * * I had previously employed Dr. Norton to render services down here. That employment was over the telephone. I expect I did the telephoning at that time. * * * I don't think I said (to Dr. Norton): 'Do the very best you can for this man.' I would not be positive about it." Thomas J. Beytaugh, witness for the defendants, testified that he was bookkeeper for Jno. Rourke & Son at the time Capt. Rafferty was injured, and that he telephoned from the office of Jno. Rourke & Son to Dr. Norton to come down there. He did not remember who requested him to telephone, but he had not seen James A. Rourke that morning before telephoning. The testimony of Henry Singleton, a witness for the de-

fendants, was to the effect that he was engineer of the steam tug Maude when John Rafferty met with the accident, and brought the boat to the wharf with him, and immediately sent for his son, James Rafferty, who immediately upon his arrival requested the witness to send for Dr. W. E. Norton, who was the family physician, and that the witness went to the office of John Rourke & Son and requested the bookkeeper to telephone to Dr. Norton to attend Capt. Rafferty. James Rafferty denied that he requested Singleton to send for Dr. Norton. A nonsuit was granted as to the partnership, as the bill of exceptions states, "after all testimony had been introduced by both plaintiff and defendants."

A verdict was rendered in favor of defendant James A. Rourke. The plaintiff moved for a new trial, the motion was overruled, and he excepted, complaining of the nonsuit and the refusal of a new trial.

Twiggs, Oliver, Gazan & Oliver, for plaintiff in error. Osborne & Lawrence, for defendants in error.

Fish, C. J. (after stating the facts as above). When one summons a physician to care for another, rendered by sudden illness unable to act for himself, and to whom he stands in no relationship which creates an obligation to furnish necessary medical care, and no express undertaking is entered into, then, from the mere summoning of the physician and requesting him to care for the person who is ill, the law does not presume an implied promise by the one so acting to pay for the services of the physician summoned. Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232; Jesserich v. Walruff, 51 Mo. App. 270; Smith v. Watson, 14 Vt. 332; Starrett v. Miley, 79 Ill. App. 658. In the last case cited a woman who was, so far as appears from the report of the facts, a stranger to Starrett, ran into his house, wounded and bleeding, and fell there unconscious. He at once called in Miley, a physician, and directed him to the injured woman, and told him to care for her. Starrett also had her carried to a room in his house. No express promise was made by him to pay the physician for the services rendered the woman. It was held that Starrett was not liable for the physician's services. In Boyd v. Sappington, 4 Watts (Pa.) 247, it was held that a request by a father to a physician to attend his son, then of full age, and sick at the father's house, raised no implied promise on the part of the father to pay for the services rendered. In Crane v. Baudouine, 55 N. Y. 256, the plaintiff attended as a physician upon the daughter of the defendant, sick at the latter's house. The daughter was of age, married and living with her husband, but temporarily at her father's house, to be under the care of her mother. Defendant was present at the calls, gave plaintiff a history of the case, and received directions for her treatment. He told others of the visits and of his opinion of the case, assented to calling a consulting physician, and had previously employed other physicians to attend his daughter. Defendant testified that he did not employ or send for plaintiff. It was held that the defendant was not liable for the plaintiff's services. In Holmes v. McKim, 109 Iowa, 245, 80 N. W. 329, it was held: "One is not under any implied obligation to pay for the services of a physician called to attend a minor living with his family and supported by him, but not otherwise related to him, though he acquiesced in the attendance and had on a former occasion paid the same doctor for attending the same minor, the physician, knowing, however, the true relations of defendant and said child." The doctrine

is well stated in 22 American & Eng. Enc. of Law, 790. In Meisenbach v. Southern Cooperage Co., supra, Judge Seymour D. Thompson, delivering the opinion said: "The reason and policy of this rule are obvious. * * * When a person is dangerously wounded and perhaps unable to speak for himself, or suffering so much that he does not know how to do it, * * * any person will run to the nearest surgeon in performance of an ordinary office of humanity. If it were the law that the person so going for the surgeon thereby undertakes to become personally responsible for the surgeon's bill, and especially for the surgeon's bill through the long subsequent course of treatment, many would hesitate to perform this office, and in the meantime the sufferer might die for want of necessary immediate attention. Nor is there a common and fair understanding that the person making the request, or ordering it to be made in behalf of the sufferer, under the circumstances, assumes responsibility for the surgeon's bill."

The general rule is well settled that a master is not, in the absence of some stipulation, under any legal obligation to furnish medical attendance for a servant who falls sick while engaged in his duties. 26 Cyc. 1049; 20 Am. & Eng. Enc. L 52. And see the valuable monographic note to the case of The Kenilworth, 4 L. R. A. (N. S.) 52, wherein many cases in point are collated. In Sweetwater Mfg. Co. v Glover, 29 Ga. 399, decided in the days of slavery, it was said: "When one white man employs another to work for him, it is not an implication or incident that the employer shall pay the employe's physician bills. It would require an express contract to create that obligation." There are cases holding that there are exceptions to this general rule, but it is needless to cite them, as it is not contended that the case at bar falls within any of the exceptions. In view of the authorities noted, the evidence in the present case, considered in its most favorable light for the plaintiff in error, did not authorize a recovery against either the defendant firm or the individual member thereof against whom the action was brought. While it would have been better practice to have directed a verdict at the conclusion of the evidence submitted by the parties, rather than to have granted a nonsuit as to the defendant firm, this is a matter of which plaintiff in error cannot complain. As the verdict was demanded by the evidence, it is not necessary to pass upon the exceptions to the charge.

Judgment affirmed. All the Justices concur.

BOARD OF HEALTH HAS POWER TO REVOKE PHYSICIANS LICENSE FOR PROCURING AN ABORTION.

MUNK v. FINK, 116 N. W. REP. 525 (NEB.) 1908

FAWCETT, C. This case is before us for the second time. The opinion on the first hearing, in 106 N. W. 425, gives a full and accurate statement of the nature of the case. When the case was remanded to the district court, that court considered it upon its merits, and affirmed the findings of the State Board of Health revoking appellant's license to practice medicine, surgery, and obstetrics in this state; and to review such judgment this appeal is prosecuted.

The former opinion in this case and our opinion in State v. Walker, 106 N. W. 127, have settled adversely to appellant his contention that the complaint under which the State Board of Health proceeded is insufficient. It is argued that our holding on the former hearing that the complaint was sufficient is not the law of the case, for the reason that the

reference to that question in the former opinion is mere dictum. In this contention we are unable to concur. Even if we were to hold that the discussion of the proposition by Ames, commissioner, in that case is dictum, we would adopt his reasoning now in holding that the complaint is sufficient, and would support such holding by the authorities cited by Judge Ames. While it is true some courts have held that in a case of this kind the offense must be alleged with the same certainty, and the evidence must be of the same degree as would be necessary in a criminal prosecution, the overwhelming weight of authority is against that idea. One of the strongest cases relied upon by appellant in support of that contention is Skeen v. Craig, 31 Utah, 20, 86 Pac. 487; but an examination of that case will show that the only reason the court so held was because section 4575 of the act (Rev. St. 1898 (Utah) under which that case was being prosecuted provides that "the trial * * * shall be conducted * * * in the same manner as the trial of an indictment or information for a felony." It will be seen, therefore, that that case could not be considered as an authority in this. Our holding in the former opinion that "a complaint filed before the State Board of Health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration," is well sustained; and the contention of appellees that proceedings before the board for revocation of a physician's certificate are not to be conducted and carried on in conformity to the technical rules of procedure obtaining in courts of justice is fully supported by the following authorities: Meffert v. Medical Board, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; State v. City of Duluth 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; Traer v. State Board Medical Examiners, 106 Iowa, 559, 562, 76 N. W. 833; People v. Thompson, 94 N. Y. 451, 461; 1 Dillon, Municipal Corporations, section 255. In Traer v. State Board, supra, it is said: "The statute does not prescribe the practice to be followed in cases instituted for the revocation of certificates; and although it may, when practicable, follow somewhat the methods of the courts, yet, from the nature of the board and the character of the duties it is required to perform, a more flexible practice than that allowable in the courts must, of necessity, be followed in many cases." In State v. City of Duluth, supra, the court say: "We also recognize the fact that while in the exercise of this power their proceedings are quasi judicial, and hence reviewable by the courts, yet they are not courts, but essentially legislative and administrative bodies, and that their action should be considered in view of their nature and the purposes for which they were organized, and not tested by the strict legal rules which prevail in trials in courts of law. Hence, if such a body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for their action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule to the proceedings of such bodies would be impracticable, and disastrous in the extreme to public interests." In People v. Thompson, supra, it is said: "The charges as made were sufficient to answer the purpose intended, and were within the requirements of the statute under which the proceeding was had. It was not necessary that the proceeding should be conducted with that degree of

exactness which is required upon a trial for a criminal offense in an ordinary tribunal of justice, and it cannot be said that the charges made were insufficient." In Meffert v. Medical Board, supra, it is said: "The provisions of the act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rule adopted by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law, and to require of a board thus composed that its investigations be conducted in conformity to the technical rules of a common-law court would at once disqualify it from making any investigation. It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the Legislature to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected against such a possibility without being embarrassed by the technical rules of proceedings at law."

The contention of appellees that the act in question was a proper exercise by the Legislature of its police powers is assailed by counsel for appellant as inapplicable and unsound, "because there is no necessity for the exercise of the power in that form;" but the contention of counsel for appellees is fully sustained in Meffert v. Medical Board, supra. The section of the statute, under which these proceedings were had defined "unprofessional and dishonorable conduct," and includes "the procuring or aiding or abetting in procuring a criminal abortion" in that definition. Counsel for appellant assails this definition as "a profound legal bizarrerie," and says that the author of that definition "should be immortalized as an apostle of the incongruous." We are unable to concur in this severe criticism of the author of the section of the statute under consideration, or of the definition referred to. If "the procuring or aiding or abetting in procuring a criminal abortion" is not "unprofessional or dishonorable conduct" in one holding a certificate entitling him to practice medicine, then we are unable to conceive of any conduct of which such person might be guilty which could be called unprofessional or dishonorable. As stated by the Supreme Court of Pennsylvania in Mills v. Commonwealth, 13 Pa. 632: "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life, and therefore it is punished."

Counsel for appellant contends that "it follows that a sufficient complaint of unprofessional or dishonorable conduct within the meaning of section 14, supra (Comp. St. 1907, ‡ 4327), must, in apt terms, charge the criminal destruction by the accused, either as principal or accessory, of a vitalized human fœtus;" that "there is here no charge, even by implication, of the destruction of a vitalized fœtus, which is the very essence of the crime of abortion." Authorities are not wanting to sustain this contention by counsel, but we fully concur in the following holding of the Supreme Court of Pennsylvania in Mills v. Commonwealth, supra: "The next error assigned is that it ought to have been charged in the count that the woman had become quick. But, although it has been so held in Massachusetts and

some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun the crime may be perpetrated." If the theory contended for by counsel for appellant should be sustained, it would be practically impossible to convict an abortionist for any abortion or attempted abortion, during the first five months of pregnancy; for, if gestation had not proceeded to the period of quickening, there would be no way of disputing the testimony of the abortionist that what he removed from the woman was in fact a dead fœtus. Even the woman herself could not dispute this testimony prior to pulsation following the quickening period. It would be giving unlimited license to the abortionist to ply his nefarious calling, provided he confined his criminal operations to the early months of gestation. We prefer to be in line with the Supreme Court of Pennsylvania, and say, although it has been so held in Massachusetts and some other states, it is not the law "in Nebraska," and never ought to have been the law anywhere.

It is also contended by counsel that by this proceeding they have been deprived of the right of a trial by jury. This contention was considered in the matter of Smith, 10 Wend. (N. Y.) 449, where it is said: "It is contended * * * that it conflicts with those provisions of the Constitution of the United States and of this state which secure to the citizens the right of trial by jury, and prohibit the establishment of any new court, except such as shall proceed according to the course of the common law * * * The power conferred by this statute is similar in its character and consequences to that which is possessed by the courts of record of this state over counselors, solicitors, and attorneys. They may by statute (1Rev. St. p. 108 '1st Ed.' pt. 1, c. 5, tit. 4, ‡‡ 23, 24) be removed or suspended by the several courts to which they belong The twenty-fourth section prescribes the mode of proceeding in such cases. They are strictly summary. A copy of the charges is to be delivered to the party, and he is to have an opportunity of being heard. But there is no grand jury to indict, or petit jury to try, nor any of the usual concomitants of a trial by jury; and yet I believe no constitutional objections were ever raised to this jurisdiction." Continuing, the court say: "The practice of physic and surgery in this state was regulated by law as early as 1760 (2 Rev. Law, p. 219, note), and such regulations have been altered and extended from time to time down to the passing of the act in question. Under the law as it previously existed the county medical society were authorized to make such by-laws and regulations relative to the admission and expulsion of members as they thought fit and proper, not inconsistent with the Constitution and laws of the state." So, also, section 5 of the act in question (Comp. St. 1709, ‡ 4319) provides that our State Board of Health "may make and adopt all necessary rules, regulations, and by-laws not inconsistent with the Constitution and laws of this state or of the United States, to enable it to perform its duites and transact its business under the provisions of this act."

The further contention is made by counsel that proceedings against appellant should have been preceded by a conviction in a court of competent jurisdiction. This contention is decided adversely to them in the Matter of Smith, supra. The court say: "The trial and acquittal of

the defendant upon the indictment for producing the abortion was no bar to this proceeding. They are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the medical profession and the consequences connected with or necessarily flowing from it. It is immaterial, therefore, in my judgment, whether the offense mentioned in the charge was indictable or not, and whether the indictment was disposed of upon its merits, or upon some matter of form." If, as stated by the New York court, a trial and acquittal of the defendant upon his indictment for producing an abortion would not be a bar to the proceeding, it follows as a matter of course that a trial and conviction for producing an abortion is not a condition precedent to proceedings to revoke a license. It is contended that no right of review of the evidence exists. A careful consideration of the question satisfies us that where the officer can only be removed, or the licensee have his license revoked, for cause, first found and ascertained by the board or tribunal provided for that purpose, the right of review should be preserved. This was so held in the former opinion in this case. 106 N. W. 425. In such a case the findings of the board should be upheld, unless it clearly appears that there is no evidence to uphold them. We have carefully read the entire record, and if it were now before us as a bill of exceptions in an ordinary court trial, with a verdict of the jury against appellant, we would be compelled to hold that the evidence sustains the verdict.

A consideration of the whole case has convinced us that the State Board of Health proceeded in the present case fairly and openly and within the powers granted to it by the Legislature; that appellant was given proper and sufficinet notice of the hearing, and every apportunity upon the hearing to vindicate himself from the charges preferred against him; that the findings and judgment of the board were in accord with the law and fully sustained by the evidence; and that the district court did not err in affirming its proceedings.

We, therefore, recommend that the judgment of the district court be affirmed.

Calkins and Root, CC., concur.

Per Curiam. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Reese, J., not sitting.

NUMBER

FORM K

PHYSICIANS DEFENSE COMPANY

CAPITAL STOCK, $100,000

Long Distance Telephones | BELL, 308 HOME, 1338

FORT WAYNE, INDIANA

In Consideration *of the written and printed application, which is hereby made a part of this contract, and the sum of Fifteen Dollars, receipt of which is hereby acknowledged, being the consideration for one year's defense, and the further payment of Fifteen Dollars annually in advance on the* _____ *day of* _____ *of each year during the life of this contract,*

The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ *of the City of* _____, *County of* _____, *State of* _____ *against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding* FIVE THOUSAND DOLLARS *in defense of any one suit, nor exceeding in the aggregate* TEN THOUSAND DOLLARS *in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—*

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Indiana, of any suit brought, or demand made; and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, or copies thereof, together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof, that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the above mentioned sums shall have been expended in said defense, providing, that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof.

Each consecutive full years' renewal of this contract shall add five per cent. (5%) of the principal sum to the amount for the defense of any one suit, and in the amount for the defense of any number of suits within one year, conformably with the table of accumulations endorsed hereon, but, such addition shall never exceed fifty per cent. (50%) of the aforesaid principal sums

This contract shall not lapse at the end of the time as stated above if the holder hereof shall pay the annual consideration to advance at the Home Office in Fort Wayne, Indiana, or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid.

No consideration or agreement contained in this contract, or application for same, can be waived or altered in any manner by any person, other than the president or secretary in writing endorsed hereon.

In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

(SEAL)

M. D.
President

Secretary

THERE is a man in the Medical Profession in whom you are interested. He should-be enlisted against the blackmailer. He is-a reputable practitioner. He should-be protected as you are protected. Have him inquire for full information. Some day he will thank you for your attention. ¶ Didn't you thank the man who told you ?

The Only Organization Exclusively Engaged

in the Protection of the Medical Practitioner

75 + 25 = 100

(The Prophylactic Equation)

An Admirable History

PHYSICIANS DEFENSE COMPANY

An Honest Purpose

FORT WAYNE, INDIANA

CAPITAL, $100,000 RESERVE, $50,000

Physicians Defense Co.

"Prophylactic in Alleged Malpractice"

FORT WAYNE, INDIANA

Organized Under a Special Statute of the State of Indiana for an Exclusive Purpose. Protection and Defense of the Medical Profession in Alleged Malpractice Suits.

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E. H. MERRITT, Secretary

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E. H. MERRITT, Secretary.

MEDICO-LEGAL BULLETIN

Fort Wayne
Indiana

PHYSICIANS
DEFENSE
COMPANY

1908

PUBLISHED QUARTERLY BY THE

PHYSICIANS DEFENSE COMPANY

Fort Wayne, Indiana

SEPTEMBER 1908 No. 3

THE MEDICO-LEGAL BULLETIN is issued quarterly, in the interests of the medical profession from a Medico-Legal standpoint, and will spare no endeavor to furnish valuable news and information relative to legislative enactments and judicial decisions affecting the profession. Communications on these subjects are solicited from all interested. Reprints of contributed original articles will be furnished, without charge, to authors making request.

One Dollar Per Annum

"Just keep your heart a beating warm,
Be kind to every fellow;
Look out for the rain bows in the storm---
But carry an umbrella."
The "Red Back"

THE PROTECTION YOU NEED AND THAT PROTECTS,
IS FOUND UNDER THE CONTRACT OF THE
PHYSICIANS DEFENSE COMPANY

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This Magazine is Printed by
THE ARCHER PRINTING COMPANY
Fort Wayne, Indiana

NUMBER FORM K

CAPITAL STOCK, $100,000 Long Distance Telephones | BELL, 2005 HOME, 1338

FORT WAYNE, INDIANA

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The Physicians Defense Company
(HEREINAFTER KNOWN AS COMPANY)

hereby agrees to defend the legally qualified Physician,

_____ *of the City of* _____, *County of* _____, *State of* _____ *against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding* FIVE THOUSAND DOLLARS *in defense of any one suit, nor exceeding in the aggregate* TEN THOUSAND DOLLARS *in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions herein below stated, to-wit:—*

Immediate notice by telegram must be given the company at the Home Office at Fort Wayne, Indiana, of any suit brought, or demand made, and the holder hereof shall immediately forward the summons, or other process served, and the complaint or petition filed, or copies thereof; together with a full and complete history of the case and services rendered.

Upon receipt of notice from the holder hereof, that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof.

Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted, or until the above mentioned sums shall have been expended in said defense, providing, that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services.

Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it.

The company shall not compromise any suit or claim for malpractice against the holder hereof.

Each consecutive full years' renewal of this contract shall add five per cent. (5%) of the principal sum to the amount for the defense of any one suit, and to the amount for the defense of any number of suits within one year, conformably with the table of accumulations endorsed hereon, but, such addition shall never exceed fifty per cent. (50%) of the aforesaid principal sums

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In Witness Whereof, The Physicians Defense Company has caused this contract to be signed by its president and secretary and its official seal attached hereto in Fort Wayne, Indiana, this _____ day of _____ 190__.

(SEAL)

Miles F. Porter M. D.
President

_____
Secretary

I HEREBY APPLY TO THE

No._____ **PHYSICIANS DEFENSE COMPANY** **$15.00**

(Hereinafter known as Company)

FORT WAYNE, INDIANA

For a DEFENSE CONTRACT FOR MEDICAL AND SURGICAL SERVICES, and agree that said contract shall be based upon the following statement of facts:

My full name is..... Office No.....Street

City of.....County of.....State of.....

If connected with a firm, the style is.....

I graduated from the..... in the year.....

I practice under the..... School of Medicine, and have been duly Registered and Licensed to practice in this County, and under the laws of this State, and am a member in good standing in the .....

.....

I do not own or maintain a hospital or sanitarium, except as follows:

Name..... No. of beds.....

I agree that this Contract shall not cover suits for damages in which services were rendered while under the influence of liquors or drugs.

I agree to notify the Company at once by telegraph when demand is made or suit commenced for damages, and to immediately forward by mail any summons served, copy of the complaint filed, a history of the case and of the services rendered as per instructions from the Home Office, and will not make nor contract any expense without the written authorization of the Company, and will contribute my own time and assistance, not pecuniary, in defense of the case, without charge to the Company.

Date.....190.... Applicant's Signature.....

Physicians Defense Company Building

COR. WAYNE and CLINTON STREETS

FORT WAYNE, - - - - - INDIANA

THE PHYSICIANS DEFENSE COMPANY BUILDING

The illustration on the opposite page represents the new Physicians Defense Company building just being completed by the company and into which it is now moving. This building represents the realization of one of its fondest hopes and is the result of years of faithful work, conscientious attention to the interests of thousands of clients throughout the United States and successful endeavors in behalf of its contract holders. It is with no small degree of pride therefore, that the Physicians Defense Company presents to the profession a brief statement of what it is and what it has accomplished.

The beautiful new building is located in the City of Fort Wayne, Indiana, at the Northwest corner of Clinton and Wayne Streets, one of the most prominent corners in the city, within a stone's throw of the County Court House, the Postoffice building, and the Municipal building; immediately across the street from the Masonic Temple and threatre, and but a block from the principal business street of the city. It is a massive structure of imposing facade and substantial construction, representing a money outlay of about $100,000. The building is of Roman pressed brick and trimmed in Lake Superior red stone. The style is of the substantial classic development and treatment.

The floors are fire-proof and sound-proof, the halls laid in mosaic tile with white marble wainscoating. The woodwork is hand-finished in antique oak.

The superstructure is of steel beams and iron columns, with fire-proof archways. The elevator shaft is a fire-proof steel one, surrounded by wide, generous stairways, with ample landings and easy of access.

The Physicians Defense Company occupies the ground floor, and these beautiful rooms are particularly desirable inasmuch as they include fire-proof and burglar-proof vaults of ample dimensions for the accommodation of the valuable records of the company.

The main entrance to the office apartments is on Clinton Street at the north end of the building and leads into a spacious hallway to the elevator shaft and wide stairs which give access to the upper floors, which are built into office suites. There are seven suites on each floor with spaces for extra office rooms, making apartments for thirty tenants. There are toilets and lavatories in each suite of offices as well as steam heating, electric lighting and gas connection. The office suites are already well filled with tenants comprising physicians, dentists and lawyers.

All of the telephone wires, electric wires and plumbing are carried into the building in protected conduits. A pneumatic vacuum office cleaning plant has been installed in the building, and there are the most improved electric bells, fire-

escapes, automatic heating and ventilating systems throughout the entire building.

In 1899 with a capital stock of only $50,000 the Physicians Guarantee Company was organized. Ever since that time the idea of medical protection has received the unqualified support of the medical profession of the United States The growth of the original company from 1899 to 1902 demanded the re-organization on a much larger scale and the Physicians Defense Company with a capital stock of $100,000 succeeded to the business of the Physicians Guarantee Company, and thousands of patrons yearly carry its contracts, which have proven in numerous instances immeasurably beneficial. Each succeeding year has added to the business of the company until it has a growth which demanded larger quarters and greater office facilities with ample protection to its vast accumulation of valuable documents. This is the reason that the company invested a portion of its surplus funds in this magnificent modern office building. This will mark a newer and a more prosperous era in the history of the corporation and as was said in one of our daily papers at the time the building was commenced, "The Physicians Defense Company is one of Fort Wayne's most notable enterprises and has established a good name in this city and in all parts of the United States."

The possession of good real estate is the best guarantee of responsibility, and the Physicians Defense Company, therefore, presents the best assurance that all the stipulations of its contracts will be honestly and faithfully performed.

Dr. M. F. Porter, of Fort Wayne, is the president; S. M. Foster, president of the German-American Bank, of Ft.Wayne Indiana, the vice-president; E. W. Cook, of Ft. Wayne, the treasurer, and E. H. Merritt secretary and general manager. The directors are: Miles F. Porter, M.D., trustee American Medical Association; Charles A. L. Reed, M.D., chairman National Legislative Committee, A. M. A., Cincinnati, Ohio; E. Fletcher Ingals, M.D., professor diseases chest, throat and nose, Rush Medical College, Chicago; James Taggert Priestley, M.D., professor practice of medicine, Iowa College of Physicians and Surgeons, Des Moines, Ia.; Frank K. Ainsworth, M.D., chief surgeon, Southern Pacific railroad, San Francisco; George McNanghton, M.D., New York City; James F. Baldwin, M.D., surgeon to Grant hospital, Columbus, Ohio; Maurice P. Hunt, M.D., Professor gastro-intestinal surgery, Medical College of Indiana, Indianapolis; S. M. Foster, president German American National Bank; C. H. Worden, vice-president First National Bank; Hon. O. N. Heaton, judge superior court; Hon. R. S. Taylor, Mississippi River Commissioner; Hon. W. J. Vesey, ex-judge superior court; William A. Bohn, treasurer National Telephone Company; E. W. Cook, secretary Citizens Trust Company; F. L. Jones, vice-president Citizens Trust Company, and E. H. Merritt, secretary.

The Growth of the Physicians Defense Company

FORT WAYNE, INDIANA

10 Years Ago—An Idea
9 Years Ago—An Experiment
8 Years Ago—A Healthy Infant
7 Years Ago—A Promising Success
6 Years Ago—A Growing Institution
5 Years Ago—A Permanent Institution
4 Years Ago—A Thoroughly Developed Fact
3 Years Ago—A Large And Expanding Business
2 Years Ago—A Great And Unrestricted Success
1 Year Ago—A Far-Reaching Prosperous Organization

TODAY---IT IS A RECOGNIZED NECESSITY

IT HAS A FEW IMITATORS, BUT NO EQUAL

MEDICO-LEGAL BULLETIN

VOL. 5 SEPTEMBER, 1908 No. 3

CIRCUMSTANCES UNDER WHICH A SURGEON IS JUSTIFIED IN PERFORMING A MAJOR OPERATION WITHOUT THE CONSENT OF THE PATIENT.

Some months ago a case was tried in a circuit court in the State of Michigan involving the question stated in the title of this article. While this court was not a court of last resort, and accordingly the decision will not be a binding precedent, yet the trial has attracted such widespread notice, and the issues involved were so novel that it is deemed worth while to reproduce some part of the court's opinion, commenting upon it in the light of such further authorities as are found in the decisions.

The circumstances of the case were briefly as follows: A boy of the age of 14 years was run over by a Michigan Central train, and his left foot was badly crushed. He was carried to a hospital, and the surgeon for the Michigan Central Railroad was summoned. Upon his arrival, about half an hour after the boy had been brought in, he found him in an unconscious condition. Upon inquiry it was learned that his relatives lived at a distance of about five miles from the hospital, and in the surgeon's judgment, an immediate amputation was required. Accordingly without awaiting the arrival of the boy's parents, the foot was amputated, and after some weeks the boy was discharged from the hospital, with a well healed leg. Suit was brought upon the grounds that no consent to the operation had been secured from either the patient or his parents, and that accordingly a trespass had been committed upon the boy's person. It was also alleged that there was no necesssity for the amputation, and that the defendant had been guilty of malpractice in deciding upon the amputation.

Upon the conclusion of the evidence the court directed a verdict for the defendant, upon the ground that under such conditions the surgeon had implied authority to perform the operation, and upon the question of negligence in determining that an operation was necessary, the court held that the surgeon's error, if error there was, was an error of judgment, and that this did not constitute negligence.

The court's opinion was in part as follows: "The plaintiff claims that a trespass was committed upon him because a natural right that he and his guardians had to determine whether an operation should be performed or not, was violated, which means that no consent, either express or implied, was had of the plaintiff before his foot was removed. It is true that a trespass is committed and a wrong is done where a physician can obtain the consent of a patient, if without that consent or in spite of it, the doctor performs an operation and the reasons have been aptly stated in the authorities and I will content myself with reading very briefly from the Minnesota Supreme Court decision. The reason is this, the patient must be the final arbitrator, whether he will take his chance with an operation or take his chance of living without it. Such is the natural right of the individual which the law raises; consent therefor of the individual must be expressly or impliedly given before a surgeon may have a right to operate. That is the general rule and that is the law in this state as well as in Minnesota. Our Supreme Court

has said it, but I quote from the Minnesota Supreme Court opinion because I happen to have it before me and it puts the matter very aptly. Are there any exceptions to that rule? There are cases that are known as emergency cases, cases where a patient is brought in, in an unconscious condition or in a state of coma, a condition where his consent cannot be obtained, and where to permit him to remain in that condition might, in the opinion of persons learned in that profession, be dangerous to his health or to his life and the question arises then, has the surgeon in such a case the right under any circumstances to operate. This is the same opinion which was cited by the plaintiff's attorney, and the reason I read from it is because this is the case they rely upon as giving the rule of law applicable to the case we now have in hand. The supreme court of Minnesota has determined that question and determined it in this language. If the person should be injured to the extent of rendering him unconscious and his injuries were of such a nature as required prompt surgical attention a physician called upon to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb and the consent on the part of the injured person would be implied. Another case cited here but cited by the other side expresses that same idea but in a little different language; it is ound in the 224th Illinois Report and I read from page 309. "Emergencies arise and when a surgeon is called in it is sometimes found that some action must be taken immediately for the preservation of the health or the life of the patient. Where it is impracticable to obtain the consent of the ailing or the injured one or of any one authorized to speak for him, in such an event the surgeon may lawfully, and it is his duty to perform such operation as good surgery demands, without such consent." That, I think covers that.

"The plaintiff claims there was a trespass and we must examine that charge. Has he establishd it? A motion was made at the termination of the plaintiff's case to take this case from your consideration and I denied that motion on the ground that we had no light on the question whether there was express consent or implied consent; we had no light on the subject whether there was a trespass or not; the defendant went on and showed what was done and it is established here and not contradicted, that when the only defendant left in this case, Dr. —— began his operation this unfortunate boy was in a state of coma, he was unconscious, Dr. ——— was not at the hospital when the case was brought in; he was the operating surgeon and when he came in it is in testimony that he made an examination and the boy was in an unconscious condition and was not at that time capable of giving his consent or withholding his consent and consequently, gentlemen of the jury, the case is presented in a different light than it was at the termination of the plaintiff's case. We now have not only a failure on the part of the plaintiff to show there was a trespass, but we have evidence that there was no trespass of that character, and that testimony not only of the defendant himself but of the several surgeons who were present at the time Dr. ———arrived and at the time he made the examination, and consequently I charge you, the plaintiff has failed in the duty devolving upon him, in establishing his case by a fair preponderance of evidence.

Now, as to the necessity of the operation, I find no authority. I find no rule of

law that compels a surgeon to wait and determine absolutely and beyond question, in an emergency case, whether he is right in deciding to operate. We can see why no such rule should exist. I hope and pray if I am injured and found on the street in an unconscious condition and am taken to the hospital that the physician will not be overcome by fear of a lawsuit and wait and wait until I come to, before he dares to operate for in the meantime I may lose my life. A principle of that kind is recognized in the profession and outside of the professon and it is recognized by the law and the law has given to these men who have received their medical education and qualified themselves to determine the matter, the law has given to them the right in the exercise of their best judgment and discretion to determine whether an operation is necessary and whether they shall go ahead and make an endeavor at least to save the health or life of the patient. We would have no operations performed at the hospital where they are absolutely necessary if physicians and surgeons were always by reason of any contrary rule, or different rule, to entertain fears of the danger to themselves and their pocket books and their welfare in case some physician, who was not present and did not see the conditions as they existed, was permitted to come afterward and testify in their judgment an operation was not necessary. I instruct you that the law is this, that you cannot take into consideration in determining whether the physician had a right to operate or not, whether there are others who might be of a different opinion. It does not become a disputed question of fact, and I instruct you all that is necessary is, first, absolute honesty of opinion on the part of the surgeon and second, the exercise of reasonable skill and the knowledge that he has obtained in the study of his profession. To go further and examine the proofs that are in this case with reference to this rule I have given you; two eminent physicians have appeared here who have testified for the plaintiff. Their testimony is based solely and alone upon the examination of the part of the foot that was amputated; neither one of them is able to express more than a belief or opinion that circulation was not, or might not have been entirely destroyed in this leg. Each one, if I remember correctly, the full import of his testimony, tells you that in his opinion it would have been wiser to wait, to delay this operation for a period long enough to determine whether or not circulation might have been had in that foot through means other than those that were destroyed in this injury. I refer to the crushed arteries and veins. That is as far as they go. One did go further, he expressed an opinion as to the probability or possibility of this circulation being brought about. Now, as to that, that would have been enough in itself if there was no evidence to the contrary but that is an expression of an opinion. On the other hand we have the testimony of those that were present, who took into consideration the things that these very physician say would have been necessary for them to have considered to justify them in expressing an opinion. These latter persons have testified and their testimony is uncontradicted and their testimony is as to a fact and not an opinion and their testimony is that the limb was absolutely dead and devitalized and lacked circulation and when in that condition circulation cannot be re-established.

I feel as you undoubtedly do, deeply sympathetic in this case; I am very sorry this unfortunate accident occurred; I may have an opinion which differs somewhat

from yours as to the advisability of that action, but it becomes my duty, no matter where my sympathy might go, to instruct you that it is not right for you or the court to go into one man's pocket to give another person compensation for a misfortune unless there is legal justification for it. In view of these reasons I direct you to rise and render a verdict in favor of the defendant, no cause of action."

There are no decisions of higher court involving precisely the same questions as arose in this case. The two cases most nearly approaching the facts are those mentioned by the court in its opinion, namely Mohr against Williams and Prass vs. Davis.

The case of Mohr vs. Williams, which is found in 108 N. W. Rep. 818, and in 104 N. W. Rep. 12, was twice tried and twice appealed. The facts were as follows: The defendant was consulted by the plaintiff for trouble in her right ear, and at her request he made an examination of that organ. He also at the same time examined her left ear, but owing to foreign substances therein was unable to make a full and complete diagnosis at that time. The examination of the right ear disclosed a perforation of the drum membrane and a large polyp in the middle ear. He informed the paintiff of the result of his examination and advised an examination for the polyp. The plaintiff was placed under the influence of an anaesthetic and after she became unconscious the defendant made an examination of her left ear and found it to be in a more serious condition than her right ear. He called the attention of the plaintiff's family physician who was present at the operation at the plaintiff's request, and this physician examined the ear and confirmed the defendant's diagnosis. The defendant then examined the right ear again, and found its condition less serious than expected. He then concluded that the left instead of the right ear should be operated upon, and proceeded to so operate. The operation was successful and was skillfully performed. The plaintiff brought suit claiming that inasmuch as she had not consented to an operation upon her left ear, the operation constituted an assault and battery. Upon appeal the Supreme Court speaks as follows: We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case such consent was unnecessary, no recovery can be had, for the evidence clearly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with consul for defendant in their contention that the consent of plaintiff was unnecessary. The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. It was said in the case of Pratt v. Davis, 37 Chicago Leg. News. 213, referred to and commented on in Cent.

Law J. 452; "Under a free government, at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person; in other words, the right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however, skillful or eminent, who has been asked to examine, diagnose, advise, and prescribe, (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operate upon him without his consent or knowledge." 1 Kinkead on Torts, Sec. 375, states the general rule on this subject as follows: "The patient must be the final arbitrater as to whether he will take his chances with the operation, or take his chances of living without it. Such is natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physicians and patients. If the physician advises his patient to submit to a particular opera' tion, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further. It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession had made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained

or given, be justified in extending the operation to remove and overcome them. But such is not the case at bar. The diseased condition of plaintiff's ear was not discovered in the course of an operation on the right, which was authorized but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were under the evidence, questions of fact for the jury.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted to at least a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unalwful. As remarked in 1 Jaggard on torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. 1Addison on Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L.R.A. 226, 27 Am. St. Rep 47.

In the case of Pratt vs. Davis, the plaintiff was in poor health, and subject to epileptic seizures and was sent to defendant's Sanitarium for an operation. The defendant performed an operation,

and after a short time the patient returned to her home. And as she did not improve, after her return, she was sent back to the Sanatarium at a somewhat later date by her husband for further treatment. At the time of her return to the Sanatarium, the evidence tended to show that she was insane, or at least incapable of exercising proper judgment in ordinary matters. During her second visit to the Sanatarium the defendant performed a radical operation. It was not claimed that the operation was negligently performed, but the patient became much worse, and suit was brought on the grounds that the operation had been performed without consent. There was no pretense by the physician that the patient herself had consented to the second operation. The Doctor's own words were: "In fact, appellant himself testified that he told Mrs. Davis just enough about her condition, and what he proposed to do, to get her consent to the first operation, and says, quoting his own language: "I worked her deliberately and systematically, taking chances which she did not realize the full aspect of, deliberately and calmly deceiving the woman; that is, I did not tell her the whole truth." And, referring to the first operation, he says: "She knew that the womb was to be operated upon, and she was willing that it should be done. Consent for further work was not obtained." Court held that the defendant had no authority to perform the operation, and affirmed the judgment of the lower court against the defendant.

Appellant then contends that, in the absence of express authority to remove the uterus, the law will imply the necessary consent from the fact that consent was, as he says, obtained for the removal of the ovaries. Before bringing this suit, appellee instituted a former suit against appellant, which seems to have been disposed of without any determination of the rights of the parties. In that suit the declaration, which was filed on September 11, 1896, averred that the ovaries had been, with the consent of the appellee, removed at the first operation upon the promise of appellant that their removal would cure plaintiff, but that their removal, instead of alleviating her condition, aggravated her troubles, and that she thereafter returned to the sanitarium, and that appellant then, without her consent or that of her husband's, removed the uterus. In this suit the only claim is for damages occasioned by the removal of the uterus, and in the course of the trial of the case now at bar counsel for appellee stated that he was claiming nothing on the account of the removal of the ovaries. Appellant argues that it appears from the facts thus recited that consent was obtained for the removal of the ovaries and that correct surgical practice requires that, when the ovaries are removed the uterus should also be removed, and that consent for the removal of the ovaries having been obtained, the right to remove the uterus followed. Appellee, by her brief, says that consent was given for the first operation, and that when she brought the first suit she erroneously believed that the ovaries were removed at that operation. Be this as it may, the declaration in the first suit does not estop appellee to show that she never consented to their removal, and as there is no evidence which tends to show that any permission was obtained for the second operation, when they were in fact removed, there is therefore, nothing to raise the implication in question.

Further objections are made to the action of the court in passing upon the proposition of law submitted. The objections, insofar as they are worthy of serious consideration, are disposed of by

what has already been said in this opinion. Where the patient desires or consents that an operation be performed, and unexpected conditions develop or are discovered in the course of the operation, it is the duty of the surgeon, in dealing with these conditions, to act on his own discretion, making the highest use of his skill and ability to meet the exigencies which confront him, and in the nature of things he must frequently do this without consultation or conference with any one, except perhaps, other members of his profession who are assisting him. Emergencies arise, and when a surgeon is called it is sometimes found that some action must be taken immediately for the preservation of the life or health of the patient, where it is impracticable to obtain the consent of the ailing or injured one or of any one authorized to speak for him. In such event the surgeon may lawfully, and it is his duty to, perform such operation as good surgery demands, without such consent. The case before us, however, does not fall within either of these two classes.

It will be noted that in each of these cases, the verdict was against the defendant, and was upheld by the higher court, but in each decision, the court intimates that a different conclusion would be reached if the evidence showed that the operation performed was necessary in order to save the life of the patient. In each of these cases, the court was of the opinion that the evidence did not show such an immediate necessity, as justified the failure to obtain a consent. Accordingly the decision of the Michigan Circuit Court, very properly quotes and relies upon these two decisions. These two decisions are practically the only ones on the point, and the question as to a physician's authority to perform an operation or extend the scope of an operation without express consent of his patient must be considered a doubtful one. However, reason and principle would seem to point fully to the correctness of the view taken by the circuit court.

Another question which has arisen in this connection is as to the necessity of procuring the consent of a husband in the case of an operation upon his wife and consent of the parents in case of operation upon minors. In a case arising in Maryland, Janey vs. Housekeeper 70 Md. 162, it was claimed by the patient's husband that he did not understand the nature of the operation that was to be performed and would not have consented to it if he had so understood. The court says that the consent of the wife, not that of the husband, was necessary in order to protect the physicians, remark: "Surely the law does not authorize a husband to say to his wife: "you shall die of the cancer; you cannot be cured; a surgical operation affording only temporary relief, will result in useless expense." The husband had no power to withhold from his wife the medical assistance which her case might require. Mayhew vs. Thayer, 8 Gray, 172. There are no decisions bearing directly upon the necessity of procuring the parent's consent to an operation upon his minor child. However, it is difficult to discover any good cause why the same course of reasoning as that employed in Janey vs. Housekeeper, should not be applied in the case of operatoin upon a minor, providnig the minor is of proper age and discretion to understand the nature of the operation or treatment contemplated, and its possible results. In the absence of statutory provision, no definite age can be fixed upon as the age at which any particular child has arrived at sufficient judgment or intelligence, but this is a matter which would vary with the individual.

Judicial Decisions.

Under this heading will be presented each issue information relative to judicial decisions affecting the medical profession.

PHYSICIAN NOT LIABLE FOR INJURY RESULTING FROM DRUGGISTS MISTAKE IN COMPOUNDING A SOLUTION.

BALL V. SKINNER, 111 N. W. 1022 (Iowa) MAY 1907

Appeal from District Court, Linn County. B. H. Miller, Judge.

The opinion states the case. Reversed.

Henry Rickel and P. W. Tourtellot, for appellant. Crimm, Trewin & Moffit, for appellee.

WEAVER, C. J. It is the claim of the plaintiff that on April 10, 1900, he suffered an injury to his ankle and employed the defendant, a physician and surgeon for many years at Cedar Rapids, Iowa, to treat it. In the course of such treatment he alleges that the defendant undertook to place a cast upon or about the injured ankle, and in so doing carelessly and negligently made use of a caustic preparation or solution which had the effect to burn and injure the flesh; that later upon the same day, plaintiff experienced great pain in and about his ankle, he recalled the defendant, who made but a slight examination, and did not remove the cast, but gave the plaintiff an opiate causing him to sleep several hours; and that as a result of this careless and negligent treatment the plaintiff's ankle and foot were so burned and injured that the flesh fell from the bones, and tendons, crippling and confining him for many months, and causing him to suffer great pain and to sustain permanent injury to his limb, for all of which he seeks to recover damages. The defendant answers in denial. There was a verdict and judgment for plaintiff in the sum of $2500, and defendant appeals.

The evidence, which in most respects is without serious dispute, tends to establish the following facts: The defendant, who is an experienced physician and surgeon, was called upon at his office by the plaintiff, who complained of some injury to his ankle, and desired, if possible, to have it treated in such manner as to permit him to go out upon the street and attend to his business. Defendant told him he could incase the ankle in a tight case which would not prevent his moving about on crutches. It appears that for the making of such casts or fixed bandages surgeons sometimes employ a solution of silicate of soda, a preparation commonly known as "liquid glass" or "soluble glass." A plain cloth bandage is first wrapped about the injured member, and over this bandage is placed several thicknesses of other cloths or bandages soaked in the solution, which soon hardens into a cast which holds the joint quite rigidly in the desired position. Physicians do not ordinarily manufacture this solution, to keep it in stock, but rely upon druggists or chemists to furnish it upon call. The defendant, having decided to use a cast of this kind, telephoned to the place of business of one Whelihan, a pharmacist doing business in the city and of whom he was in the habit of purchasing such

materials, to send him a quantity of the solution. Whelihan replied that he had none on hand, but could make some, and was told to proceed to do so. The solution is a mixture or compound of soda and silica and water, and when these elements are used in the proper proportion the compound so made may be applied to the skin of a person without injurious results; but, some of these elements being of a caustic nature, if they are not compounded in the right proportion to neutralize such quality, its application to the skin or flesh is liable to produce serious injury. Whelihan, with his assistant, proceeded to prepare the solution, and when completed sent it to the office of the defendant, who thereupon made use of it in bandaging and fixing the plaintiff's injured ankle. This treatment was concluded about one or two o'clock in the afternoon, after which plaintiff returned home. About six o'clock in the evening the plaintiff sent for the defendant, who responded to the call, and, upon complaint of the plaintiff that his foot was paining him, defendant cut the bandage part way down from the top. Upon this being done, plaintiff seemed to be relieved, and defendant left him for the night. On the following morning, the defendant repeated his visit and removed the cast and bandages from the injured limb. It was then revealed that the flesh upon the defendant's foot and ankle had been severely burned and injured, as if by a caustic preparation. Immediately thereon defendant applied remedies to arrest the injurious results of the application and continued to attend the plaintiff thereafter for several months, till he was substantially recovered. It is not denied that the injury is one of considerable severity, or that the plaintiff suffered pain and loss of time therefrom, and the question to be settled in this litigation is whether, conceding such injury, the same is properly chargeable to negligence on part of the defendant. It is the claim of the appellant that in the trial of this question in the court below there were several errors entitling him to a reversal of the judgment rendered against him, and to a new trial.

1. Several exceptions are urged to rulings of the trial court upon the introduction of evidence. We cannot take time to consider all these objections in detail, but will refer to the following as presenting questions of materiality and merit: The defendant being a witness in his own behalf, and testifying also as an expert surgeon, was speaking with relation to his visit to the plaintiff on the evening after the cast had been placed on the ankle, and was asked the following question: "Q. Assuming that this preparation is as caustic as it has been shown to be by its effect upon this man's ankle, I will ask you whether or not the caustic had expended its force and done its damage by the time you got there and cut that down?" Answer to this question was ruled out on objection of the plaintiff as being incompetent, irrelevant, and immaterial. We think that the answer should have been allowed. It will be observed, by reference to the appellee's claim, that he charges negligence in two respects: First, in the application of the solution to the plaintiff's ankle; and, second, in failing to discover the difficulty and remove the bandages at the time of the defendant's visit on the evening after the first treatment. Now, if the jury should find, as it well might find under the testimony, that the defendant was not chargeable with negligence in the first treatment, and was negligent in failing to see the character of the application and remove the bandage upon his visit to the plaintiff in the evening, it would be very

material to ascertain whether the damage or injury of which complaint is made had already taken place before defendant's said visit. The question asked by counsel was fairly well calculated to elicit relevant testimony on this point, and it was an error to exclude it. The druggist Whelihan, testifying for the plaintiff, stated that he compounded the solution according to a formula found in the United States Dispensatory. On cross examination a colloquy arose between witness and counsel over the fact and witness was asked to look at the book and see if the assumption of counsel was not right. On redirect examination plaintiff's counsel was permitted to read an extended extract from the book, and ask the witness if he did not find it there. Objection to this question was overruled, and witness answered in the affirmative. The objection should have been sustained. The witness having first testified concerning the book formula, it was proper to cross-examine him thereon; but such cross-examination did not open the door to plaintiff to place the contents of the book before the jury in support of his case. The defendant, as a witness in his own behalf, was asked if he knew whether Druggist Whelihan at the time in question was holding himself out and advertising himself as a manufacturing chemist, and upon objection of the plaintiff, the answer was ruled out.

We think that the evidence sought by this inquiry was very material. If Whelihan was doing business as a reputable druggist or chemist and holding himself out to the world as a person skilled in such work, then under ordinary circumstances, the defendant would be justified in depending upon his reliability and competency and accepting the solution purchased of him as being what it purported to be; and, in the absence of any circumstance which should have put him on his guard, he would not be chargeable with negligence in using such solution upon the plaintiff's ankle. The matter inquired about had a direct bearing upon the first ground of negligence alleged by the plaintiff and should have been admitted.

2. Complaint is made of certain remarks by the court pending the trial and in the presence of the jury as having a clear tendency to disparage evidence offered by the defendant and to prejudice his defense in the minds of the jury. For instance, objection having been made by plaintiff to certain matter offered in evidence by defendant, the court ruled upon it in the following words: "I don't see where this testimony can do any harm." Again, defendant being asked whether physicians generally rely on the druggist for the purity, quality, and proper compounding of their drugs and medicines, and objection being made thereto, the court said: "Taking my own observation and knowledge of that matter, I think that most all surgeons and physicians in this country, don't as a rule, rely on ordinary druggists." All physicians that I am acquainted with buy their own remedies, and don't rely on the druggst." And, again, another Cedar Rapids physician testifying for the defendant was asked substantially the same question, and again an objection made, the court interposed as follows: "Do they depend on the druggist? Most of them have their own drugs in our country." Having with this remark sustained the objection, the court thereafter seems to have changed the ruling with the following explanation: "Now, it is proper to show the custom of physicians in Cedar Rapids and vicinity in ordering drugs of a registered pharmacist to rely upon their purity. As I said to you the other day, they might rely

upon the skill and all that of the pharmacist. They might rely on that, and would perhaps. I don't mean to offend the defense when I said that most of our physicians had their own drugs, but the fact is, and the fact remains, that you can't go scarcely to a physician's office I am acquainted with in Cedar Rapids, or any place else, but what you find a pharmacy there. That is the matter I spoke about, and not in any way to influence this jury one way or the other." Concerning the first incident above mentioned, it may be that the court's remark to the effect that certain evidence admitted could do no harm was not a happy one, yet we do not think it involves reversible error. The objection raised to the other remarks of the court in the presence of the jury are of a much more material character. It will be observed that, in the first instance, when it was sought to show that, in ordinary practice of medicine and surgery, it was the general custom or practice of physicians or surgeons to rely upon druggists for the compounding and preparation of remedies and applications employed or prescribed by them, the judge not only ruled out evidence of the alleged fact on part of the defendant, but proceeded himself to negative the truth of such contention by stating his own observation and knowledge to the contrary. This ruling and remark, as we understood the record, was never changed or withdrawn. Later in the course of the trial, when another witness was on the stand, and the same kind of testimony was offered, it was met with a repetition of the same ruling and substantially the same statement by the court. At this time, however, the court seemed finally to have concluded to admit the offered evidence, but, while disavowing any intention to offend any of the parties or to improperly influence the jury, proceeded to reassert the truth of his former remarks by the declaration that "the fact remains" that of his personal knowledge the physicians of Cedar Rapids and elsewhere maintain their own pharmacies. In other words, while changing the ruling and admitting the evidence, its value was effectually neutralized by a statement from the bench which, in substance, denied its truth. It is not to be understood from this language that the learned trial judge to put the appellant at a disadvantage before the jury; but we are fully persuaded that such must have been the effect of his remarks, and the exceptions taken there to must be sustained.

3. Both parties introduced and examined expert witnesses on various phases of the controversy, and from the very nature of the case the evidence in support of the defense was very largely of that character. To govern the jury in the consideration of expert testimony the court gave the following instructions:

"Instruction 11. You are not to substitute for your own conclusions, upon the evidence in the case, the opinions of expert witnesses; but it is your duty to determine the issues involved from all the evidence introduced in the case.

"Instruction 12. You will carefully consider the expert testimony which has been adduced in the case, and give it the weight you think it justly entitled to, taking into consideration whether or not the hypothetical questions propounded to the experts are based upon facts established in the case. Such expert evidence should not overthrow positive and direct evidence of creditable witnesses who testified from personal knowledge. You are not bound by the opinions of the experts, but should determine the questions involved in the case from all the evidence, including the evidence of the expert witnesses.

"Instruction 13. You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the statements contained in the hypothetical questions, are true, and what, if any, are not true. Should you find from the evidence that some of the material statements contained in such hypothetical questions are not correct and are not borne out by the evidence, and they are of such a character to entirely destroy the reliability of opinions based upon the supposed state of facts contained in such questions, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. An opinion based upon a supposed state of facts wholly incorrectly assumed, or incorrect in its material facts, to such an extent as to impair the value of the opinion, is of little or no weight."

Error is assigned upon the giving of these instructions. When read as an experienced lawyer would read it, there is little for the appellant to complain of in the eleventh paragraph. The only criticism which may justly be passed upon it is that the rule of law is stated so briefly and badly that the average juror may not recognize the implied restrictions and limitations which a lawyer would discover in the terms employed. It is true that the verdict when reached is to reflect the final opinion and conclusion of the jury upon the whole case, and jurors are not to substitute the opinions of witnesses for their own, yet in stating this rule care should be observed to avoid giving them the impression that they can properly reject evidence simply because it is expert in character, and register their own conclusions without giving it any consideration. In other words, they should be made to clearly understand that their verdict is not to be founded upon their private personal views of the subject abstractly but upon the conclusion to which their minds are brought after a fair consideration of all the evidence, both expert and non-expert.

In the twelfth paragraph, the statement that the jury should "not allow expert evidence to overthrow positive and direct evidence of creditable witnesses, testifying from personal knowledge," we think cannot be approved. The rule as stated in the instruction is evidently quoted or adapted from expressions made use of by this court in Borland vs. Walrath, 33 Iowa, 130, and Whitaker, v. Parker, 42 Iowa, 585. It will be noticed, however, on examination of these cases, that in each of them the question at issue was the genuineness of certain written signatures, and we think that it is a fairly well established proposition that, upon the matter of disputed handwriting, expert evidence is subject to special limitations and is accorded less consideration when opposed to the positive evidence of creditable witnesses speaking from personal knowledge than is given to evidence of expert witnesses in general.

MALPRACTICE IN TREATMENT OF A COLLES FRACTURE

Willard v. Norcross 69 Atl. Rep. 942. May 1908 (Vt.)

Tyler, J. The first question in issue was whether the plaintiff had suffered an impacted "Colle's fracture" or a severe sprain, and another question followed it, namely: whether or not the defendant

treated the case with the skill required of a physician and surgeon. The plaintiff claimed, and her evidence tended to show, that the injury consisted of a fracture of the radius, and that, if it were only a sprain, the defendant treated it skillfully. On the other hand, the defendant claimed and his evidence tended to show that the injury was a sprain only; that his treatment of the case was skillful; that it was skillful if the injury were a fracture.

1. The plaintiff's counsel inquired of her whether, after the defendant made the first examination of her wrists the night after she was injured, she was able to move her hand or any of her fingers, and she answered, "No." The objection to the question was that it ingeniously connected the defendant and his first visit with the plaintiff's pitiable condition that night, as if to lay the blame to him when he was not responsible for her condition. As bearing upon the character and extent of her injury, it was competent to show the condition of her hand and fingers the night after the accident.

2. The accident occurred in December, 1902. In the following May the plaintiff met the defendant and showed him her wrists, and asked him what she should do, to which he replied: "Come up to my barn and milk my cows, and do my chores, and you will be all right." The plaintiff said to him that her wrists pained her so that she was almost insane, to which he replied: "Good, good enough." Counsel make a question whether this interview between the parties was had while the relation of physician and patient continued between them. The plaintiff's question, asking advice, and the defendant's answer, giving it, indicated that they both understood that the relation still existed. The answer seems frivolous, yet the defendant may have meant that the plaintiff should exercise her wrists, which was consistent with his theory that they were only sprained. All his conduct in relation to his treatment of the case was a proper subject of inquiry as bearing upon the question whether he diagnosed and treated it skillfully. The admission of this evidence cannot be held reversible error.

Exceptions 3 and 4 are not briefed by the defendant.

5. The plaintiff's evidence tended to show that on the defendant's first examination he was asked whether liniment would be a good application, and that he answered, "Yes; use horse liniment, or any old thing;" that the defendant set no bones, prescribed no medicine, bandages, nor application of any kind except said liniment. Dr. Van Allen was called by the plaintiff as an expert witness, and duly qualified as such. He was asked whether he considered the prescribing of horse liniment good surgery in case of Colles' fracture, and he answered, subject to the defendant's exceptions, that it was not good surgery. One objection to the question was that in answering it the witness must assume the province of the jury. It is true that the rule by which the defendant's treatment of the case was to be tested was that of ordinary skill, such skill as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. Hathorn v. Richmond, 48 Vt. 557; Mullin v. Flanders, 73 Vt. 97, 50 Atl. 813; Sheldon v. Wright, 80 Vt. 298, 67 Atl. 807. Upon this question physicians and surgeons of practice and experience are experts and their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice. Whether the defendant's treatment was good surgery or proper treatment, whatever the nature of the

injury, was a question upon which the witness was competent to testify. As to the other objection, the plaintiff was trying her case upon the claim that she had sustained a fracture, and Dr. Van Allen so testified. It does not appear by the exceptions where the witness resided nor that he did not testify from his knowledge of the practice of physicians and surgeons of ordinary skill in that general neighborhood.

6. Mrs. Hodson, a witness called by the plaintiff, testified under the defendant's exception to what occurred after the accident and before the defendant saw her, and that she complained of pain in her wrists. The objection to this evidence was that it did not tend to throw any light upon the nature of the injury, and because the complaints were made before the defendant's arrival. As the plaintiff's condition and complaints of pain tended to show the severity of her injury, we think that this evidence could not have been properly excluded.

7. Mrs. Hodson was also permitted to testify, subject to the defendant's exception, that after the plaintiff's wrists had been examined by the medical experts, and she had returned from the court house to her room, her wrists were disfigured and swollen, and that she complained of suffering pain from them. This evidence was admitted to corroborate the plaintiff's claim as to the condition of her wrists at the time of the trial. The specific objection to this evidence was that the then condition of the wrists was due to the manipulation of the surgeons. It must be borne in mind, however, that the defendant was charged with malpractice; that the plaintiff claimed that by reason of unskillful treatment her wrists still caused her suffering. In this view, it was competent for her to show their condition at any time before or during the trial. The fact was not withheld from the jury that the experts had recently manipulated them, and there was no occasion for their being misled.

8. This exception cannot be better stated than by quoting from the record: "On direct examination, in the opening of her case, the plaintiff testified, the court ruled, and the defendant objected and excepted, as follows: 'Q. I wish you would tell the number of different doctors that Dr. Norcross has had examine your wrists since this controversy arose. A. There was Dr. Steming of Coaticook, Dr. Potter of East Charleston. Mr. Redmond: The examination of her wrists was immaterial. We object to this line of evidence as being wholly immaterial—any evidence of prior examinations. Whatever examinations were made were made with her consent. Nobody claims the contrary. Mr. Howe: We expect to show that another examination was made at the time this case was tried before with the same result and same effect upon the plaintiff; that that examination was made by Dr. Mitchell and Dr. Leith of Lancaster and by Dr. Allen, a very eminent surgeon of St. Johnsbury, and these doctors testified before and all three testified that she received a Colles' fracture. Mr. Redmond: We object to Mr. Howe pursuing this matter further, and ask for an exception to the remarks already made. Mr. Howe: Instead of changing our position or making any change of witnesses, I offer to show by these witnesses that was the reason the pictures were not introduced and as tending to show a shift of this defense if they don't call Drs. Mitchell and Leith and Allen, which it seems they are not intending to do. Mr. Dunnett: I think we should be allowed an exception to the statement made by Dr. Howe in the presence of the jury. It must be per-

fectly obvious that no such statement could be made in good faith.' Exception allowed. The defendant had shown by his cross-examination of the plaintiff that before the first trial of this case in the county court she had consulted Dr. T. M. Stiles, of St. Johnsbury, had him examine her wrists by the X-ray and he and a Mr. Clark had made X-ray photographs of her wrists; that Dr. Stiles told her at that time that he was unable to discover by the X-ray that her wrists had been fractured, and that he did not think they had been; that she did not produce Dr. Stiles or use him as a witness in the first trial nor had she used the photographs in the first trial, but had kept that matter secret during the first trial. 'Court (to defendant): Do you expect to argue with the plaintiff on account of the nonproduction of the photographs? Mr. Redmond: No, your honor, we shall not. We shall argue merely. We expect to argue on some evidence we will put in later. They were informed by the physician they employed to make this examination, and that physician was present when that photograph was taken. Mr. Howe: They have proved it that the photographs were not produced on the cross-examination of our witness: Now, we insist as explaining that fact, whether they choose to argue it or not, it may have an unfavorable inference, and we have a right to clear that matter up with this explanation." During this colloquy between counsel the court twice said to the jury that the statements of counsel were not in the case and should be wholly disregarded by them. The court also suggested to the plaintiff's counsel not to anticipate this line of defense, but meet it in rebuttal, which suggestion seems to have been adopted. We think that, in the circumstances, the remarks of the plaintiff's counsel were not subject to exception. They were made, as the counsel said, in explanation of the fact of the plaintiff's not producing the photographs and to prevent an unfavorable inference being drawn from that fact. They were made to meet a position taken by the defendant and for this purpose they were justifiable.

10. The defendant deemed it of some importance to testify that he made an arrangement by which the plaintiff went to board with Mrs. Renei in Island Pond, and that she remained there four weeks; that while she was there he visited her almost daily, gave Mrs. Renei directions as to her care of the plaintiff; and that he saw that his directions were fulfilled. We can conceive of no purpose that this evidence could serve other than to show the defendant's attention to and care for the plaintiff, and to meet the plaintiff's claim that he was indifferent about her case. It certainly was not reversible error for the court to allow Mr. Clark, the overseer of the poor, to testify that he made part of the arrangement with Mrs. Renei.

11. Dr. Johnson, a witness called by the defendant, had testified that the plaintiff had not suffered a Colles' fracture that upon examination he found her wrists in a normal condition in every respect; that exhibit 7, an X-ray photograph of the plaintiff's wrists was a picture of normal wrists. Dr. Smith, called in rebuttal, was permitted to testify that No. 7 did not represent a normal wrist, that it showed that a small portion of the styloid process of the raidus of one wrist was broken off, and that there was a gradual expansion in the lower end of the radius in the normal bone, while in the abnormal the slant was more abrupt. This evidence was objected to on the ground that it was not rebutting and was admitted under exception. The testi-

mony of Dr. Smith did not raise a new issue, nor was it subject to the objection that it was merely cumulative evidence. It was offered and admitted to directly contradict the testimony of Dr. Johnson, and was within the definition of rebutting testimony as given in our cases cited in the plaintiff's brief.

Judgment affirmed.

PERSON CALLING PHYSICIAN HELD NOT LIABLE FOR HIS FEES

MacGuire v. Hughes 111 N. Y. Supp.
June 5, 1908

Ingramah, J. The action was brought to recover for medical services. The complaint alleges that between the 11th of November, 1903, and the 17th day of January, 1904, the plaintiff, as a physician, rendered certain professional service, at the special instance and request of the defendant in and about the treatment of the defendant's daughter, Mrs. J. J. Bradley; that the services were reasonably worth the sum of $3,000; that the defendant had not paid the pliantiff the said sum or any part thereof, and demands judgment therefore. The answer denied the allegations of the complaint, except that the plaintiff is a physician and surgeon and the defendant has not paid the plaintiff the sum demanded or any part thereof. Upon the trial the plaintiff testified that in November, 1903, he was called on the telephone by the defendant, who inquired whether the plaintiff had been called to see her daughter, who was very ill; that the plaintiff told her that he had not been; that the defendant then told the plaintiff that Mrs. Bradley, her daughter Maude, was seriously sick; that she lived in 102d street, and asked the plaintiff to go over to see her; that the plaintiff told her that he could not go over to see her daughter without the consent of her daughter's husband; that the defendant then said that she believed her son-in-law objected to having the plaintiff called in; that, when the plaintiff returned to his office on the 12th of November, he found the defendant and her son-in-law (husband of the defendant's daughter who was ill) waiting for him; that the defendant introduced her son-in-law to the plaintiff and asked the plaintiff in the presence of her son-in-law to go and see her daughter, when the plaintiff said that he was satisfied to go. Upon cross-examination as to the interview with Mr. Bradley, he testified that he did not remember anything that Mr. Bradley said; that his attitude was one merely of acquiescence in the plaintiff's attendance; that he interpreted Mr. Bradley's presence as a consent of Mr. Bradley that the plaintiff should attend Mr. Bradley's wife, and he attached no further importance to it than that Mrs. Hughes' action had been approved of; that Mrs. Hughes said nothing in the presence of Mr. Bradley, except that she asked the plaintiff if he would go and see her daughter, who was dangerously ill; that Bradley then left, saying that he would go ahead in the street cars; that after Bradley left, the defendant repeated to the plaintiff what she said over the telephone with regard to her anxiety to have the plaintiff called in earlier in the case, and that the reason why he had not been called in was the objection on the part of her son-in-law, whereupon the plaintiff left his house in a carriage that the defendant had brought there, and went with the defendant to Mrs. Bradley's residence; that, when he got there, he found that Mr. Bradley had already returned, and the plaintiff made an examination of the patient; that after he had made the ex-

amination he said he would like to withdraw from the case, and have nothing to do with it; that the condition of her daughter was particularly grave, dangerous, and bad; that he did not wish to have anything to do with such a case; that, in response to that, the defendant said, "Doctor, you have been my friend, you have attended my family, you have attended my husband and our children and I beg of you for God's sake, don't desert Maude," and the plaintiff then consented to remain in the case; that the plaintiff continued in charge of the case, and called in a consulting physician; that the patient was subsequently removed to a hospital, and died in the following month. The plaintiff was aware that his patient was married to Bradley; that she was living with her husband, apart from the defendant; and that it was at Mr. Bradley's house that he was asked to attend Mr. Bradley's wife. At the close of the plaintiff's case, the defendant moved to dismiss the complaint upon the ground that the plaintiff had failed to prove a cause of action, which motion was denied.

The defendant testified that Mrs. Bradley was her doughter, and that her daughter's husband was John J. Bradley; that she had a consultation with Bradley on the subject of employing the plaintiff, and as a result of that conversation Bradley went with the defendant to the plaintiff's house; that she introduced Bradley to the plaintiff, who said to the plaintiff that he would like to have him come up and see his wife, and gave the plaintiff his address; that the plaintiff wrote it down, and said he would go right up with the defendant in the cab that she had there; that the only conversation as to the plaintiff's attendance upon Mrs. Bradley was with Mr. Bradley; that the defendant had several interviews with the plaintiff about her daughter's illness; that the plaintiff had been the defendant's family physician for a long time, and she recommended him to Mr. Bradley for that reason; that there was no question of employment or payment, or as to whom would be responsible for the services rendered ever spoken of. Bradley, defendant's son-in-law, testified that he had engaged a Dr. Pidgeon to look after his wife; that the defendant seemed to be very much worried about the way things were, and she spoke about the plaintiff and asked him if he would have any objection to the plaintiff's coming there; that Bradley said he had not, and that he would go down and get the plaintiff, when the defendant said that she would meet Bradley at the plaintiff's office; that Bradley was introduced to the plaintiff, and asked the plaintiff to come to Bradley's house to see his wife, and the plaintiff came there; that he was able financially at the time of the illness of his wife and her subsequent death to pay any fair and reasonable charge which might be incurred in connection with her ailment, and that he was able at the time of the trial to pay such charges; that he never received any bill from the plaintiff, and never refused to pay for the services rendered. Both sides having rested, the defendant renewed the motion to dismiss the complaint which was denied. The court submitted the question to the jury, who found a verdict for the plaintiff and, from which the appellant, appealed to the Appellate Term, where it was affirmed, and then appealed to this court.

The evidence from which plaintiff seeks to infer a promise of the defendant to pay for the services rendered by plaintiff is that defendant requested the plaintiff to attend her daughter, who was seriously ill, and she exhibited much anxiety about the condition of her daughter. The de-

fendant had great confidence in the plaintiff, who had been her family physician for many years, and was anxious that he should see her daughter; that the doctor refused the request of the defendant, insisting upon the consent of the patient's husband, and the defendant went to the office of the physician and, as a result of what there happened, the plaintiff consented to and did take charge of the case and rendered services for which a recovery is sought. The plaintiff refused to act upon any employment by the defendant, and would only undertake the case with what he called the consent of the person who was legally responsible for the services that he was asked to render, and who was the one to whom he would naturally look for payment had he united in the request. All that the defendant did was to urge the plaintiff to act as her daughter's physician. There was nothing that was said by the defendant from which could be inferred a promise to be personally responsible for the services rendered, nor were services rendered to her or to one to whom she was under an obligation to provide a physician.

The question, therefore, presented, is whether a person is responsible for merely requesting that a physician attend a patient for whom the person making the request is under no obligation to supply medical attendance. I think that question has been conclusively determined in the negative in this state and in England. The leading case in this state is Crane v. Baudouine, 55 N. Y. 256. In that case the situation was much like the present. The patient was a daughter of the defendant who had passed her majority, was married, and lived with her husband and her children separate from her father in a house of their own, although in that case the fact existed which does not exist here, that the patient had been brought from her own house to that of the defendant for the special purpose of having the patient under the immediate care and attention of her mother during her sickness; but the court held that this did not impose upon the defendant any greater obligation than existed before, nor did it give ground for the law to imply a special obligation. In discussing the question generally, the court said:

"It is true that particular acts will sometimes give rise to particular obligations, duties, and liabilities, But the party whose acts are thus to affect him must be in such predicament as that those acts have of legal necessity a significance attached to them at the time, which he may not afterward repel. * * * It is true that a person may not avail himself of the benefit of services done for him without coming into an obligation to reward them with a reasonable recompense. But he cannot be said in the meaning of the law to avail himself of services as so done when they are not for his individual benefit, nor for that of any one for whom he is bound to furnish them. The acquiescence of one in the rendering of service or benefit to another, not entitled to call upon him therefor, is not equivalent to an acknowledgment that it is rendered at his request. So far as legal responsibility was concerned, the defendant, though the father of the patient, was a stranger to her and to her necessities. He could neither require of her, nor be required upon by her."

The court then cited with approval the case of Boyd v. Sappington, 4 Watts (Pa) 247, where it was held that a special request by a father to his physician to attend upon his son, then of full age, but lying sick at the father's house, raised no implied promise on the part of the father to pay for the services rendered, and the case of Veitch v. Russell,

3 Ad. & Ell. (H. S.) 927, where it is said:

"A physician attends in every case on request. That fact alone is not sufficient for the inference of a special contract."

The court then proceeds:

"It was the duty of the plaintiff to know or to learn the true legal status of the patient, and what were her true legal relations to the defendant; and he cannot rely upon any seeming legal and necessary dependence of her upon him."

This case seems to have been followed, without question, both in this state and other states. See Meisenbach v. Southern Cooperage Co. 45 Mo. App. 232; Dorion v. Jacobson, 113 Ill. App. 563. See, also, Smith v. Watson, 14 Vt. 332. The principle established in these cases, which is a simple restatement of the common law, is that a simple request to perform services for another to whom there exists no obligation of any kind to furnish the services does not create an implied obligation to pay for such services by the person making the request, and that a promise to pay cannot be implied from a simple request that the services be rendered; and I apprehend that this principle is not peculiar to the relation of a physician and his patients, but extends to all cases where services personal in their character, are rendered by one person to another. There was in this case no express promise by the defendant to pay to the plaintiff for his services to the defendant's daughter. There was great anxiety about the daughter and her condition shown by the defendant and an ardent desire that the daughter should receive the benefit of the plaintiff's professional skill and experience. The plaintiff knew that the patient that he was asked to attend was married and living with her husband, that he refused to attend the patient without her husband's consent. The husband's consent was obtained, and there then arose the obligation on the part of the husband to pay for the plaintiff's services to his wife. When that consent was obtained, the plaintiff at once consented to see the patient. He exacted no promise from the defendant as to compensation; nor was there anything said from which there could be implied an understanding that the services were to be rendered for the defendant, and not for the patient and her husband. He required the consent of the patient's husband to accept the employment, and continued in charge of the case to the end under such consent. There was therefor nothing, as I view it, in this case which raised a presumption that the plaintiff's serivces were rendered to the defendant, or that the defendant promised to pay for them; and I think it was error to deny the motion to dismiss the complaint.

There was also an error committed on the trial to which attention should be called. The plaintiff had called an eminent physician in consultation, and this physician was called as a witness to testify as to the value of the plaintiff's services. He testified that the services were worth $2,000, the amount of the patient's bill. Upon cross-examination he testified that he rendered a bill against the defendant for his services, which she refused to pay, and he brought suit against her. He was then asked whether he failed to recover, which was objected to by the plaintiff. The court characterized the question as absolutely improper, and stated to counsel that he should know better. Counsel stated that it was asked upon cross-examination as to the bias of the witness against the plaintiff, and the court allowed the defendant an exception. I think this question was proper, and that the criticism of the defendant's counsel by the court was unjustified. The

witness was called as an expert. He had testified as to the value of the plaintiff's services, fixing the value at the same amount fixed by the plaintiff and which was the amount sued for, and it was proper to allow upon cross-examination any question to show that the witness had a prejudice or bias against the party against whom he was testifying. This was especially important in relation to testimony of this character, which is not as to the existence of a fact about which the witness could be presumed to testify correctly, but about a question of opinion in relation to the value of services, which is very liable to be largely influenced by feelings of antagonism or friendship.

The judgment appealed from must be reversed, and a new trial ordered, with costs to the defendant to abide the event.

McLaughlin and Scott, JJ., concur.

Houghton, J. (dissenting.) I cannot assent to the proposition that the plaintiff did not make a prima facie case of hiring by the defendant. I assume it must be conceded to be the law that a physician is entitled to recover compensation for his services, and that his hiring need not be express, but may be inferred from an implied contract; and, also that a parent of a married daughter may, if he choose, contract with a third party to perform services or furnish necessaries for her.

The only principle to observe in determining whether the parent is liable to pay in case of necessaries like medical attendance is the presumption that the contract was made by the parent in behalf of the person primarily liable, which in the present case was the husband of the daughter. The moment that presumption is overcome the contract of hiring must be given effect and the parent must pay. The testimony of the plaintiff is that the defendant telephoned to him, asking if he had been called to see her married daughter, who was very ill, and, upon his replying that he had not, asked if he could go and see her, and the plaintiff replied that he could not go without the consent of the daughter's husband. Testifying further, as to conversations, he said:

"Mrs. Hughes said further to me that she believed her son-in-law objected to having me called in; that the objection made by her son-in-law to calling in myself into the case had alarmed her."

This conversation was about the 1st of November, and matters seem to have rested as they were for 10 or 12 days, when, on the evening of the 12th of November, the plaintiff on returning to his office found the defendant and her son-in-law waiting for him. The son-in-law was introduced, and the defendant, in his presence, asked the plaintiff if he "would go up and see her daughter, that she was dangerously ill." The husband left, the defendant remaining in the office to take the plaintiff to her daughter in the carriage in which she had come,which she did. While the plaintiff was preparing to go with her, "she repeated what she had said on the telephone with regard to her anxiety to have me called in earlier in the case and she repeated then that the reason which I had not been called in earlier in the case, and the objection on the part of her son-in-law." After the plaintiff made an examination of the condition of the daughter, he told the defendant that he would like to withdraw from the case because of the condition in which he found the patient. In response the defendant said:

"Doctor, you have been my friend, you have attended my family, you have attended my husband and our children, and I beg you, for God's sake, don't desert Maude."

Thereupon the plaintiff consented to continue his treatment of the daughter. The next day, the condition of the patient becoming worse, the plaintiff advised with the defendant, and told her that he thought it advisable to call in a consulting physician; that she told him to spare no pains, and to do everything possible for her daughter. On cross-examination the plaintiff is more specific. He says that the conversation with the husband consisted merely of an introduction, and that in his presence the defendant said: "This is Mr. Bradley, my son-in-law, and I want you to go up and see my daughter, and that Bradley said nothing and immediately departed.

It is perfectly manifest from what took place that the defendant brought her son-in-law to the plaintiff's office, not for the purpose of having him solicit the plaintiff to attend his wife, the defendants daughter, but simply for the purpose of showing the plaintiff that the son-in-law had withdrawn his objections to the defendant having the plaintiff treat her. The plaintiff testifies that he so understood the interview, and that nothing was said which could lead him to believe that the husband had come there to engage his services, or to hire him, but that as he assumed his only purpose was to evidence his consent that his mother-in-law might employ him. The defendant denied that she asked the plaintiff to attend her daughter, and said that at the interview with plaintiff at his office, the son-in-law, and not herself, requested that he should do so. On cross-examination she admits that she called him on the telephone, but says she simply asked him if he had been called, and said nothing further, and that she did not regard her daughter as seriously ill, and never asked the plaintiff what her malady was, or expressed any wish that he continue to treat her. The jury very properly disbelieved her story, and credited that of the plaintiff.

The case of Crane v. Baudouine, 55 N. Y. 256, appears to be curiously misunderstood. All that case holds, or that any case in our jurisdiction dealing with the right of a physician to recover for services holds, is that expressions of natural anxiety and solicitude concerning treatment of a sick relative or friend, or the summoning of a physician by a stranger as an act of humanity, shall not be tortured into a contract of employment. Veitch v. Russell, 3 Ad. A Ell. (N. S.) 928, cannot be regarded as an authority, because that decision was put expressly upon the ground that the compensation of a physician was merely honorary, and that he had no legal right to recover in the absence of an express contract. As an introduction to his opinoin, Lord Denman

"It must be assumed as clear that physicians and counsel usually perform their duties without legal title to remuneration."

Boyd v. Sappington, 4 Watts (Pa) 247, was reversed on the ground that the father was not permitted to show that the son for whom the physician's services were rendered had property of his own and was doing business for himself, and this upon the ground that it went to the probability of the doctor having rendered services on account of the son alone. The measer authorities on the subject are reviewed in Foster v Meeks, 18 Misc. Rep. 461, 41 N. Y. Supp. 950, and it is there held that one who requests a physician to attend another personally, without disclosing that he is acting only as agent, becomes liable to pay the physician's bill. To the same effect is Bradley v. Dodge, 45 How. Prac. (N. Y.) 57. The evidence in the present case cannot

be tortured into proving that the defendant hired the plaintiff on behalf of her daughter's husband. He had his own physician in attendance, and objected to calling the plaintiff and finally yielded to the importunities of the defendant and permitted her to call the doctor she desired. Folger, J., in Crane v. Boudouine, supra, which is relied upon for a reversal of this judgment, expressly stated that a physician may recover upon an implied contract, and that an express contract is not a necessity. In that case the referee had found against the physician, and the General Term had reversed the judgment and the Court of Appeals simply held that the referee was best qualified to pass upon the question of fact as to whether there was a hiring or not in view of the defendant's denial of employment, and that the evidence was not so preponderating in plaintiff's favor as to authorize the overturning of the decision. To my mind such is the situation in the present case, and, the jury having found in favor of plaintiff, its verdict should not be disturbed.

There are no errors of law requiring a reversal. Plaintiff's witness, Dr. Cleveland, had been fully interrogated as to her having presented a bill to defendant and her refusal to pay and his having brought suit against her. His bias was fully shown, and it was wholly immaterial whether he lost or won in his litigation. Indeed, it would have been error to prove the judgment obtained in the other action between different parties and founded necessarily on different evidence. I think the judgment should be affirmed.

Laughlin, J., concurs.

MALPRACTICE

ROBERTSON v. WENGER, 110 S. W. REP. (663) (MO.) MAY, 1908

BORADDUS, P. J. This is an action for malpractice. The petition charges that defendants, at or about the 7th day of September, 1906, held themselves out as healers of physical injuries, ailments, and diseases, their treatment being commonly known as that of osteopathy; that at the date mentioned defendants undertook to treat plaintiff for injuries he had theretofore suffered by a fall; and that while so treating plaintiff it was their duty to use reasonable care and skill; that defendants failed in their duty, in that they negligently treated plaintiff for a dislocation of the hip joint, when in fact no such dislocation existed, and defendants in treating plaintiff for said supposed dislocation of the hip joint did so violently, unskillfully, and negligently manipualte, handle, and deal with plaintiff's body that they were not joined and united in apposition, but were permitted to heal in a misshapen and malformed manner. The answer of defendants admitted that they were osteopathic physicians, but denied all the other allegations of the petition. The case is here as to the evidence on a short bill of exceptions pursuant to rules 8, 9, 10 of this court (57 S. W. R.) The evidence of plaintiff tended to prove the allegations of his petition, and that of the defendants to controvert that of the plaintiff. The cause was tried before a jury, which after being instructed by the court, returned a verdict for defendants. The plaintiff appealed from the judgment.

The error complained of was the action of the court in giving in behalf of the defendants' instruction No. 1, which is as follows: "The jury are instructed that in this case the defendants, Drs. Wenger and Wood, are not charged by the plaintiff with being unskillful or with a lack of professional skill and knowledge, or as not being properly trained and qualified physicians, but that in the examination

or diagnosis and treatment of plaintiff's injuries they (defendants) did not use ordinary skill, but negligently and unskillfully treated plaintiff. Hence, if you believe and find from the evidence that in the examination and treatment of plaintiff's injuries defendants used such reasonable care and diligence as is customarily used by physicians of ordinary skill under similar circumstances, the plaintiff can not recover herein, and your verdict must be for defendant." The objection to the instruction is that it removed from the consideration of the jury the question of defendants unskillfulness and want of knowledge. The contention of defendants is that the question of defendants' skill and knowledge was not made an issue by the pleadings. It is held that "a petition charging a surgeon with malpractice, which alleges that he undertook to reduce and set the bone and to attend, cure, and heal the same, and also alleges that he promised carefully and skillfully to perform this service, but that he carelessly, negligently, and unskillfully failed to set, locate, and reduce the dislocation and bind up, dress and secure the same, taken altogether does not set out an express promise to cure, but only such an undertaking as the law implies, which is to employ reasonable skill and diligence." Vanhooser v. Berghoff, 90 Mo. 487, 3 S. W. 72. "In accepting a patient the physician says that he possesses and will exercise reasonable skill and judgment to discover the trouble of the patient, and whether it is curable." And, "if the failure of a physician to discover and cure the trouble of his patient is because the physician does not possess reasonable skill, or because he does not exercise such skill, he is not entitled to any pay for his services." Logan v. Field, 192 Mo. 54, 90 S. W. 127. The allegations of the petition that defendants held themselves out to the world as healers of diseases and physical injuries and their undertaking to heal plaintiff was sufficient to raise the implied obligation that they possessed the skill and knowledge necessary for the purpose.

The plaintiff's instruction 1 was as follows: "The court instructs the jurors that where persons hold themselves out to the public as practicing a method or system of treating diseases, or ailments of or injuries to the human body, the law implies a promise or duty on their part to use reasonable skill and care in the matter of said treatment. And the court further instructs the jurors that if at the time when plaintiff was suffering from bodily injuries received from the fall from the ladder on the band stand referred to in the evidence defendants were holding themselves out to the public at Fulton, Mo., as practicing a method of system (known as osteopathy) of treating diseases and ailments of or injuries to the human body, and if the defendants undertook to treat plaintiff for the bodily injuries theretofore received in said fall, and did not use reasonable skill and care in the matter of said treatment, and in treating plaintiff for said injuries caused by the said fall from the ladder on the band stand defendants did so violently, unskillfully, and negligently manipulate, handle, and deal with plaintiff's body that defendants did fracture and break plaintiff's left thigh bone in one or more places, or if defendants, after so breaking or fracturing plaintiff's thigh bone, if such was the case, did negligently and unskillrully treat said fracture or fractures, and did by said negligence and unskillfulness cause to permit the fractured parts of said thigh bone to join and unite together in a faulty, misshapen, and malformed manner, then the

jurors will find the issues for the plaintiff, and assess his damages as indicated in other instructions given in the case." This instruction seems to comply with the plaintiff's theory of the case, and was a proper application of the law to the facts of the case; but it does not necessarily follow that the one given for defendants was erroneous and misleading, although the court told the jury that the defendants skill and knowledge were not put in issue by the pleadings, as the jury were at the same time told that defendants liability depended upon the question of their exercise of reasonable care and skill in the treatment of defendants injuries. When we say that a physician is obligated by his undertaking to use skill, it is necessarily and uanvoidably implied that he must have such skill, otherwise he could not exercise it.

We are not in a position to know whether there was any evidence tending to show that defendants did not possess the requisite professional skill and knowledge, but that could make no difference, as proof of the failure to exercise such skill and knowledge to the satisfaction of the jury would have entitled him to recover, and, if he failed to make such proof, the inference would be that they possessed and exercised such skill and knowledge. In other words, defendants could not have successfully controverted plaintiff's evidence without having shown such to be the case. We cannot see how plaintiff could have been prejudiced by the instruction.

Affirmed. All concur.

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